(26,298)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 831.

ERIE RAILROAD COMPANY, PETITIONER,

vs.

JOHN R. SHUART, LEO SHUART, AND JOHN R. SHUART, JR., DOING BUSINESS UNDER THE NAME OF JOHN R. SHUART & SONS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

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1 Supreme Court, Appellate Division, Second Judicial Department.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs-respondents,

against

ERIE RAILROAD COMPANY, Defendant-appellant.

Statement.

This action was commenced by the service of a summons and complaint on June 24, 1913. Defendant duly appeared herein on July 14, 1913, by Watts, Oakes & Bright, its attorneys, and thereafter and on September 2, 1913, served its amended answer. Plaintiffs appeared by Frank Comesky, their attorney, and defendant appeared by Watts, Oakes & Bright. The names of the original parties in full are as stated above, and no change of parties or attorneys has been made.

2 *Notice of Appeal from Judgment and Order.*

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

against

ERIE RAILROAD COMPANY, Defendant.

SIRS: Please take notice that the defendant, Erie Railroad Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department from the judgment entered herein on December 12, 1913, in the office of the Clerk of Rockland County for the sum of Four hundred seventy six and 07/100 dollars ($476.07), in favor of the plaintiffs and against the defendant, and from the order made herein on the 9th day of December, 1913, and entered in the said Rockland County Clerk's office on December 13, 1913, denying defendant's motion to set aside the verdict in the above entitled action and for a new trial; and defendant appeals from each and every part of said judgment and from each and every part of said order, and from the whole thereof and each thereof.

Dated, January 9, 1914.

WATTS, OAKES & BRIGHT,
Attorneys for Defendant.

Office and Post Office Address, 4 East Main Street, Middletown, New York.

3 To Frank Comesky, Esq., Attorney for Plaintiffs. Jonathan W. Sherwood, Esq., County Clerk of Rockland County.

Summons.

Supreme Court.

Trial Desired in Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

vs.

ERIE RAILROAD COMPANY, Defendant.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, June 19th, 1913.

FRANK COMESKY,
Attorney for Plaintiffs.

Office and P. O. Address, Nyack, N. Y.

4 *Complaint.*

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

vs.

ERIE RAILROAD COMPANY, Defendant.

The plaintiffs herein, complaining of the defendant, for a cause of action against it respectfully allege:

I. That plaintiffs now are and at times hereinafter mentioned were co-partners in business, trading under the firm name and style of John R. Shuart and Sons, and having their principal place of business at the Village of Suffern, in the Town of Ramapo, Rockland County, New York.

II. Upon information and belief, the defendant now is and at all times hereinafter mentioned was a domestic corporation, organized

and existing under and by virtue of the Laws of the State of New York; that it owned, operated, controlled and exercised all supervision over a certain railroad known as the Erie Railroad which extends from Jersey City in the State of New Jersey, through the Village of Suffern, to the City of Buffalo, in the State of New York, together with its roadbed, rolling stock, switches, cattle chutes and all other equipment.

III. On or about April 4th, 1912, plaintiffs were the owners
5 of a carload of horses which they shipped from East St. Louis in the State of Illinois, by way of defendant's said railroad, to the Village of Suffern aforesaid.

IV. Said carload of horses arrived at the Village of Suffern aforesaid, about three o'clock in the Morning of the 9th day of April, 1912, and was thereupon placed by defendant upon its switch, and said car was disconnected from the train of defendant, of which it was a part, and the freight thereon paid by plaintiffs to defendant, and said carload of horses was by defendant delivered to plaintiffs, and all control, supervision and interest in said carload of horses by defendant thereupon ceased and terminated and plaintiffs accepted such delivery and thereupon took possession of the same.

V. Thereafter while plaintiffs, their servants and employees, were unloading said horses; and without any fault or carelessness on plaintiffs' part and solely through the fault of defendant, defendant caused a train of cars to be negligently and carelessly moved upon said switch and brought with great force and violence against the said car in which plaintiffs' horses were, thereby knocking said horses down, throwing them against the sides of the car and against each other, whereby they became sick, sore, lame and injured to plaintiffs' damage in the sum of Seven hundred thirty-five and 65/100 ($735.65) dollars.

Wherefore, plaintiffs demand judgment, against the defendant in the sum of Seven hundred thirty-five and 65/100 ($735.65) dollars, besides the costs of this action.

FRANK COMESKY,
Attorney for Plaintiffs.

Office and P. O. Address, Nyack, N. Y.

6 ROCKLAND COUNTY, *ss:*

John R. Shuart of said county, being duly sworn, deposes and says, I am one of the plaintiffs in the above entitled action; I have read the foregoing complaint and know the contents thereof; the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

JOHN R. SHUART.

Sworn to before me this 21st day of June, 1913.
[SEAL.] GLODE R. VAN HOUTEN,
Notary Public.

Amended Answer.

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

vs.

ERIE RAILROAD COMPANY, Defendant.

Defendant, for its amended answer to the complaint herein,
7 Admits that plaintiffs are now and at the times stated in the complaint were copartners in business, trading under the firm name and style of John R. Shuart and Sons, and having their principal place of business at the Village of Suffern in the Town of Ramapo, Rockland County, New York, that defendant is and was a domestic corporation at the times stated in the complaint and at such time was the owner and operator of a railroad extending from Jersey City through the Village of Suffern and elsewhere; and that on or about April 4, 1912, plaintiff shipped a car containing some horses from East St. Louis, in the State of Illinois, to themselves at the said Village of Suffern.

Upon information and belief, defendant denies each and every other allegation of the complaint.

Defendant for its further answer to the complaint and as its first and separate defense thereto alleges that prior to or at the time of the shipment of said carload of horses plaintiffs for a valuable consideration duly entered into a contract with the initial and connecting carriers of said carload of horses from East St. Louis, Illinois, to Suffern, New York, and by and under the terms of said contract it was agreed between plaintiffs and defendant that no claim for damages which might occur to said plaintiffs under said contract would be made or sued for in any court by said plaintiffs or allowed or paid by the said initial carrier or any of the connecting carriers, of which the defendant was one, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of said plaintiffs or their agent, and delivered to a certain officer of the initial carrier within five days from the time said stock is removed from said car, and that if any loss or damage occurs upon the line of a connect-
8 ing carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs. Plaintiffs have failed and wholly neglected to make any claim in writing, verified by the affidavit of either the plaintiffs or their agent or otherwise, within five days or within any other period of time, to any proper officer or agent of this defendant, and no such claim has at any time been made by plaintiffs or received by this defendant, although more than five days have elapsed after the time plaintiffs removed the said horses from the said car at the

said Village of Suffern and before the commencement of this action.

Defendant for its further answer to the complaint and as its second and separate defense thereto alleges that prior to or at the time of the shipment by plaintiffs of the said carload of horses plaintiffs for a valuable consideration duly entered into a contract with the initial and connecting carriers of said carload of horses from East St. Louis, Illinois, to Suffern, New York and by and under the terms of said contract it was agreed between plaintiffs and defendant that not in any event should defendant's liability exceed one hundred dollars for each horse, irrespective of whether the loss or damage occurred through the negligence of defendant or of its employees or otherwise.

Defendant for its further answer to the complaint and as its third and separate defense thereto alleges that prior to or at the time of the shipment by plaintiffs of the said carload of horses plaintiffs for a valuable consideration duly entered into a contract with the initial and connecting carriers of the said carload of horses from East St. Louis, Illinois, to Suffern, New York, and by and under the
9 terms of which said contract it was agreed between plaintiffs and defendant that the plaintiffs were and are at their own sole risk and expense to load and take care of, and to feed and water such stock while being transported, whether delayed in transit or otherwise, and to unload the same, and that neither the said initial carrier nor defendant is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

Wherefore, defendant demands judgment dismissing the complaint of the plaintiff, with the costs and disbursements of this action.

WATTS, OAKES & BRIGHT,
Attorneys for Defendant.

STATE OF NEW YORK,
County of New York, ss:

J. E. Packer, being duly sworn, says that he is the *the* assistant secretary of Erie Railroad Company, the defendant in this action; that he has read the foregoing amended answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

J. E. PACKER.

Sworn to before me this 25th day of August, 1913.

[SEAL.] A. L. TRAVIS,
Notary Public, No. 110, *Kings County.*

Certificate filed in New York County, No. 11.

My commission expires March 30, 1915.

10 *Bill of Particulars.*

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

vs.

ERIE RAILROAD COMPANY, Defendant.

The following is a bill of particulars served herein pursuant to defendant's application, verified herein on the 9th day of September, 1913:

1. The number of horses that plaintiffs claim were injured is five.

2. The following is a description of each horse injured, namely: One sorrel mare, one bay mare, one black horse, one brown mare and one black horse.

3. The present whereabouts and name and address of the present owner of each of said horses, so far as the plaintiffs are able to state, are as follows, namely:

a. The sorrel mare was sold at public auction about one month after her arrival at Suffern, to a stranger who immediately took her away and she was never seen or heard from thereafter by plaintiffs.

b. The bay mare was sold to Arthur Gale of Spring Valley who still owns her.

c. The first black horse above mentioned, was sold to Frederick Schultz, who still owns her.

11 *d.* The brown mare was sold to Jacob Schultz of Suffern, who still owns her.

e. The second black horse above mentioned, was sold to George Geiger of Monsey, who still owns her.

4. The injury and extent of the injury claimed by plaintiffs, to have been sustained by each of said horses, together with the period of disability of each, is as follows:

a. Sorrel mare—injury to side, followed by an abscess therein. Injury to ankle. Injury to foot, the hoof thereof torn and split. Period of disability, one month.

b. Bay mare—hurt in shoulder. Period of disability, two months.

c. Black horse—hurt in back. Period of disability, one month.

d. Brown mare—cut and bruised in the head, followed by an abscess. Period of disability one month.

e. Black horse—hurt in tendons and split hoof. Period of disability, one month.

5. The damage plaintiffs claim was sustained with respect to each of the horses aforesaid, is as follows: Sorrel mare, $135. Bay mare, $150. Black horse, $125. Brown mare, $65. Black horse, $67.50.

To the above should be added the following items: Veterinary bill, $10. Medicines, $8.15. Loss of one horse $175.

12 *Clerk's Minutes of Trial.*

At a Term of the Supreme Court Held in and for the County of Rockland, at the Courthouse at New City, on the 8th Day of December, 1913.

Present: Hon. Arthur S. Tompkins, Justice Supreme Court.

JOHN R. SHUART, LEO SHUART, and JOHN R. SHUART, JR.,

vs.

ERIE RAILROAD COMPANY.

Frank Comesky.
Watts, Oakes & Bright.

Jurors called and sworn:

Garret A. Springsteen,
Rolley J. Knapp,
C. B. De Baun,
S. R. Bradley,
Gordon Conklin,
John C. Wood,
William Nelson,
William Schek,
Stephen W. Haire,
James Buckley,
Seeley Redmer,
Michael Griffin.

Witnesses for Plaintiffs:

John R. Shuart.
G. B. Hustis.
John Shuart, Jr.

Case given the jury under charge of the court, and were then retired to their room under charge of court officer duly sworn and after mature deliberation were directed by the court to bring in a sealed verdict.

13 December 9, 1913.

Court convened at 9:45 A. M.

Present: As yesterday.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR.,

vs.

ERIE RAILROAD COMPANY.

Frank Comesky.
Watts, Oakes & Bright.

Jurors presented their sealed verdict in which they fined "for the plaintiff the sum of Three hundred and seventy-five dollars damages."

An extract from the minutes.

CYRUS M. CRUM, *Clerk.*

14 *Judgment.*

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

vs.

ERIE RAILROAD COMPANY, Defendant.

The issues in this action having been brought on for trial and tried before Mr. Justice Arthur S. Tompkins, and a jury, at a Trial Term of this court, held at the Court House in Clarkstown, on the 8th day of December, 1913, and the plaintiffs appearing by Frank Comesky, Esq., their attorney, and the defendant appearing by Watts, Oakes & Bright, its attorneys, and a verdict for the plaintiffs having been duly rendered in the sum of $375 and the plaintiffs' costs having been adjusted at the sum of $101.07. Now on motion of Frank Comesky, attorney for the plaintiffs, it is

Adjudged, that plaintiffs, John R. Shuart, Leo Shuart and John Shuart, Jr., recover of the defendant, Erie Railroad Company, the sum of $375 found by the jury, together with the sum of $101.07 costs, amounting in all to the sum of $476.07, and that plaintiffs have execution therefor.

Judgment signed this 12th day of December, 1913.

CYRUS M. CRUM, *Clerk.*

15 *Order Denying Motion to Set Aside Verdict and for New Trial.*

At a Trial Term of the Supreme Court of the State of New York, Held in and for the County of Rockland, at the Courthouse, in New City, New York, on December 9, 1913.

Present: Hon. Arthur S. Tompkins, Justice.

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

against

ERIE RAILROAD COMPANY, Defendant.

This action being at issue, having been duly noticed for trial at and placed upon the calendar of a Trial Term of this court appointed to be held at the Court House in New City, New York, on the first day of December, 1913, and having been reached in its due order upon the regular call of the calendar at said term, and having been tried before the court and a jury on December 8, 1913, and the jury having rendered a verdict on December 9, 1913, in favor of the plaintiff and against the defendant in the sum of $375, and the defendant having moved to set aside said verdict and for a new trial upon the exceptions taken during the trial and upon the ground that
16 the verdict is against the law and against the weight of evidence and upon all the grounds set forth in Section 999 of the Code of Civil Procedure except that it was for insufficient damages, and after hearing Watts, Oakes & Bright, attorneys for defendant, in support of said motion and Frank Comesky, attorney for plaintiff, in opposition thereto, it is

Ordered, that said motion be and the same is hereby denied.

Enter,

A. S. T.,
Justice Supreme Court.

Case and Exceptions.

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

against

ERIE RAILROAD COMPANY, Defendant.

The issues joined in this action came on for trial before Mr. Justice Arthur S. Tompkins, and a jury at a Trial Term of the Supreme

Court of the State of New York, at the Court House in New City, Rockland County, New York, on December 8, 1913.

17 Appearances:

Frank Comesky, for plaintiffs.
Elbert N. Oakes and John Bright, for defendant.

A jury was empaneled and sworn.
Mr. Comesky, on behalf of the plaintiffs, opened the case to the jury.
Mr. Oakes waived opening to the jury.

JOHN R. SHUART, one of the plaintiffs, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Comesky:

Q. Mr. Shuart where do you live?
A. Suffern, not in the village, about three miles east.
Q. What is your business?
A. Fruit grower.
Q. Have you ever been in the livery business?
A. Yes, sir.
Q. Have you bought and sold horses?
A. Yes, sir.
Q. How long were you in that business?
A. I have been in that business off and on about twenty years.
Q. Have you been in the business of buying carloads of horses in the west and moving them or bringing them on here and selling them?
A. Yes, sir.
Q. Are the other plaintiffs, John Shuart, Jr., and Leo Shuart, your sons?
A. Yes, sir.
Q. In the early part of April, 1912, did you and your son Leo go to East St. Louis for the purpose of buying a carload of horses?
A. Yes.
Q. Did you buy a carload of horses there?
A. Yes.
Q. Do you remember when it was that you started to ship them east?
A. I think it was on the 4th of April.
Q. Over what road did you ship them?
A. We shipped over the Clover Leaf, and then to Buffalo
18 over the Nickel Plate, and from Buffalo on the Erie, we billed out from St. Louis over the Erie.
Q. You billed your horses from St. Louis to Suffern?
A. Yes, sir.

Q. And these other roads were roads over which you passed before striking the Erie?
A. Yes.
Q. How many horses did you have?
A. Twenty-two.
Q. Did you and your son ride on the freight train on which this car was?
A. Yes.
Q. How far did you accompany the car?
A. To Buffalo.
Q. When you arrived at Buffalo what did you do?
A. We left the car there about two o'clock Sunday morning. I was taken sick, and I said I was going home in the passenger train.
Q. Did you notify anybody connected with the railroad?
A. Yes, I went to what I supposed was the yardmaster and told him that I was taken sick and wasn't going with the horses any more, and asked them to put it on the freight bill so the freight gangs wouldn't be looking for us, and so he took a pen and wrote on the freight bill that I was taken sick and gone home.
Q. Did your son Leo have charge of a car?
A. Yes, a car for Crandall and Company.
Q. You were billed with your car of horses?
A. Yes.
Q. And he was billed with the other car?
A. Yes, sir.
Q. Did you travel home to Suffern on a passenger train?
A. Yes, sir.
Q. You and your son Leo?
A. Yes, sir.
Q. Did you buy a ticket and pay your fare?
A. Yes.
Q. What time did you arrive in Suffern?
A. Somewhere between seven and nine o'clock at night.
19 Q. On the day you left?
A. Yes, we left Buffalo somewhere about eight o'clock in the morning.
Q. What day of the month was it?
A. The 7th.
Q. You arrived in Suffern the evening of the 7th?
A. Yes, sir.
Q. I understand that the general direction of the main line of the Erie at Suffern is north and south, the general direction?
A. Yes.
Q. What is known as the Piermont Branch leaves the main line just west of the Suffern passenger station and runs from there to Piermont?
A. Yes, sir.
Q. The freight station at Suffern, the freight house is located on the north side of the Piermont branch and a little bit to the east of Wayne Avenue?
A. Yes.

Q. Is there a switch track that runs along the north of the main branch track from a point out near the main line in an easterly direction to a point on the branch track near the lumber company's yard?

A. Yes, sir.

Q. Between the two points that I have mentioned there are two or three other short switch tracks?

A. Yes, sir.

Q. There is a cattle chute there at Suffern?

A. Yes, sir.

Q. Is that located just east of the freight house?

A. East of the freight house platform, yes.

Q. That cattle chute is nothing more than a runway made of wood, about four feet in front on the track side, and about twelve feet long?

A. About fifteen feet long.

Q. And about how wide?

A. I should say four feet.

Q. It has a fence on either side to keep the cattle from running off it?

A. Yes, sir.

Q. What connects that cattle chute with the cattle car?

A. The sides are connected with gates, and the floor is connected with a bridge.

20 By the Court:

Q. Which rests on the floor of the car inside the door?

A. Yes.

By Mr. Comesky:

Q. Did you keep posted as to the location of your car of horses after you arrived at Suffern?

A. Yes, sir.

Mr. Oakes: We object to that as immaterial.

The Court: It is not very material.

Q. Did you learn that the car was approaching Suffern before it arrived there?

A. Yes, sir.

Q. Did you make arrangements for the payment of your freight?

A. My son did.

Q. On the arrival of the car did you see the conductor of the train?

A. Yes, sir.

Q. Do you remember what his name was?

A. Welch.

Q. Did you see him as he was placing the car?

A. Yes, sir.

Q. Where did he and you stand at that time?

A. In the cattle chute.

Q. Did he have a lantern with him?
A. Yes, sir.
Q. Was there a brakeman on top of the car?
A. There was a man on top of the car with a lantern, I took him to be the brakeman.
Q. How was the car placed there, was it put in ahead of the engine?
A. Yes, sir.
Q. You and the conductor stood in the cattle chute—what did you say to the conductor or what did he say to you?
A. I told the conductor to be careful in placing the car, and get it just right, we didn't have any pinch bar, and if he left there we couldn't get it unloaded.

21 By the Court:

Q. Just right in what respect, so the door was opposite the cattle chute?
A. Yes, sir.
Q. You wanted it placed so the bridge could be placed through the door into the car?
A. Yes, sir.

By Mr. Comesky:

Q. What did he say to you?
A. When it got about as we thought it was right he said, "How is that, Mr. Shuart?" I said, "That is good." And he cut them off and signalled, and they stopped, the man put on the brake and he motioned to the engineer to back away, and it backed away and went down the track, and the man got off the car and went away.

By the Court:

Q. Left the car there?
A. Yes, and then the conductor said, "You had better get them out as soon as you can, they have been on the road a good while and must be tired and hungry."

By Mr. Comesky:

Q. What did you do?
A. We got the door opened as soon as we could.
Q. You started at once?
A. Yes.
Q. While he was standing right there?
A. Yes, sir. We went to put the bridge down, and found that the car was higher than the other cars we had unloaded, so it stood up in the car, and I was afraid the horses might step in under it and throw themselves, and I had to send to the stable and get a fork and we piled this full of manure so the horses could get out, and the gate on the east side was drawn, and we had to get boards, and we nailed the boards from the east side of the cattle chute to the car door.

22 By the Court:

Q. That was to form a side on the east?

A. Yes, so they wouldn't fall out between the chute and the car, and on the west side, the car being higher it wouldn't let the top hinge hook and only the bottom hinge would hook, and I got Mr. Hunter to hold the top so it wouldn't fall in as the horses were passing out.

By Mr. Comesky:

Q. Then what did you do?

A. I got hold of two horses, and my son got hold of two, and we had one of the other boys to knock the bar out across the door, and we had the bar knocked out and was just going to lead the horses out when the train hit us.

Q. What did you hear or see at that time?

A. Before we were hit?

Q. No, at that time?

A. I heard a crash and heard the noise in the car——

By the Court:

Q. What happened to the car?

A. The car right afterwards I found had moved down about three feet, and that the bridge was twisted around and turned up, and the boards were torn loose—I am not certain whether they were torn loose from the car or from the sides of the cattle chute, but they were torn loose from one side.

By Mr. Comesky:

Q. At the time of the blow did you hear the horses in the car, or see how they moved?

A. Yes, sir.

Q. In what direction did the horses go?

A. The horses went east.

Q. After that did you observe what it was that had hit your car?

A. It was the train of cars that backed up against it.

23 Q. You were knocked down, were you?

A. Yes, sir.

Q. Did you leave the cattle chute and go to see what had happened?

A. I did.

Q. Did you take a lantern with you?

A. I did.

Q. What did you find on that switch track farther to the east commencing with your car?

A. There was about five or six box cars coupled up to the engine against us.

Q. And the engine was farther to the east?

A. Yes, sir.

Q. Did you remain there and see the car pulled back in place?
A. No.
Q. You devoted your attention to your son?
A. Yes, sir.
Q. You didn't help unload the horses?
A. I did not.
Q. But the horses were finally unloaded by the trainmen?
A. By the trainmen.
Q. Was that because you refused to unload them?
A. Yes, sir.
Q. Did you make an examination of your horses after that?
A. The next morning.
Q. This was about what time in the morning?
A. I judge somewhere about half-past two or three o'clock.
Q. Did you look the horses over to see what condition the horses were in?
A. The next morning about eight o'clock I looked at one. That night one of my sons came and said that one of the horse's head was bleeding.
Q. You can't tell what your son said. Did you look at one of the horses that night?
A. Yes.
Q. What condition did you find him in?
A. I found he was cut in the head, and he was bleeding and the blood was dropping off his nose.
Q. How many horses did you find were injured?
A. Five.
24 Q. Starting with the sorrel mare what injury *do* you find to her?
A. I found that her foot had been stepped on, and the shell of the hoof was torn loose from the flesh on the left outside quarter of the left front foot, about an inch and a half long, and that her right ankle on the other side was bruised and skinned, and the skin was knocked off, and that had started to swell, and there was a small lump starting in her side, about the fifth or sixth rib, just back of the saddle, about half the distance from the back to the belly, and that afterwards made an abscess, it kept growing every day until it got to be an abscess.
Q. What do you say about the swelling of the ankle, did that continue?
A. Yes, that got larger, and we treated it and got it down somewhat, but her ankle was still swelling when I sold her, and the abscess was still running when I sold her,—I had her a month.
Q. How long was it before she was able to be used?
A. We tried to drive her a couple of times, but the abscess was in the way of the saddle, and we didn't drive her.
Q. You say that that period of disability was a month?
A. Yes, sir.
Q. Was this horse sound before she met with the accident?

Mr. Oakes: Objected to.

The Court: He may tell what he observed about her.

Q. Did you observe?
A. I bought her for a sound horse, and she was sound.

By the Court:

Q. Did you examine her before she was put in the car?
A. Yes, sir.

By Mr. Comesky:

Q. Was she sound?
A. Yes, sir.
25 Q. What was she worth there in Suffern if she was sound that morning?
A. I would have got $275 for her.

Mr. Oakes: We object.
The Court: Strike it out.

The Witness: She was worth $275.
Q. What did you sell her for?
A. $165, I sold her at public auction.
Q. What was the care and treatment of her worth for a month?

Mr. Oakes: Objected to as incompetent, improper and not pleaded.

Objection sustained.

By the Court:

Q. What was the appearance of these wounds, how did they appear, the torn hoof and the bruise on her side,—how long had they been on her?
A. The torn hoof was fresh, and on her right ankle——
Q. They were fresh wounds?
A. Yes, sir. There was no break in the right side where the abscess was, but it was a small lump about the size of a hickory nut the next morning, and by noon it was the size of a turkey egg, and it kept getting bigger until it got to be the size of a good size cocoanut, and we watched it and treated it, and it broke and turned to a running abscess.

By Mr. Comesky:

Q. How did the swelling in the ankle look at first?
A. At first it wasn't much larger than the ordinary leg, but by night it was swelling all the way up to the knee, and it continued that way, it stayed swelled about two weeks, and then we got it gradually to go down.
26 Q. Did you notify any officer or agent of the railroad company about the condition of these horses?

Mr. Oakes: Objected to.
The Court: He will have to tell who the person was.

Q. Did you notify the freight agent at Suffern?

By the Court:

Q. Who did you notify?
A. Mr. Udder, the station agent at Suffern. I told Mr. Udder I had five horses hurt and I wished he would go and look at them.
Q. Is he the freight agent there?
A. Yes, sir, so far as I know.
Q. Does he handle the freight?
A. We paid the bills to him.
Q. You paid the freight on these horses to him?
A. Yes, sir.

The Court: I think he may tell what he said to the agent. Objection overruled.

Exception by Mr. Oakes.

The Witness: Mr. Udder said he didn't know anything about the horses, and it wouldn't do for him to examine them. I said to get somebody. Nobody came, and about two days afterwards I went to him again.
Q. When did you speak to him first?
A. The next morning, the same morning, Tuesday morning, he said he would not come, and I said, "Get anybody you like," and so he went for a veterinary there, and he came and examined the horses, about four or five days after the accident, I think it was.

By Mr. Comesky:

Q. I call your attention to the bay mare, one of the horses of this carload, and ask you, what, if any, injury you found to her
27 the following morning?
A. She was hurt in the shoulder so she was lame, we took her out to give her a drink the next morning, and had a job to lead her up to the trough, she just dragged her toe along.
Q. Was there any swelling in the shoulder?
A. No, sir.
Q. How long was she disabled?
A. Two months.
Q. Was she sound when you bought her and put her in the car?
A. Yes, sir.

Mr. Oakes: I suggest that he has not testified that he saw the horse.

Q. Did you examine each one of these horses at the time you bought them and at the time you shipped them on this train?
A. Sure, we always examined them. The horses we bought in the afternoon we had to examine before seven o'clock at night, and the horses we bought in the morning we would have to examine before one o'clock in the day, if we don't whatever is the matter with them goes.

Q. You examined each one of these horses?
A. Yes, sir.
Q. You examined each one of them the morning after the accident?
A. Yes, sir.
Q. Was this bay mare that you have spoken of, the second horse, sound at the time that you delivered her to the defendant to be shipped to Suffern?
A. Yes, sir.

Mr. Oakes: I object, and move to strike out the answer on the ground that it is incompetent and improper. The witness has already testified that he didn't deliver these horses to the defendant, but delivered them to the Clover Leaf Railroad Company.
The Court: Strike it out.

28 Q. When was the last you saw these horses?

The Court: Before they were shipped.

Q. No, as you came along this road?
A. When I left them at Buffalo about two o'clock in the morning.

By the Court:

Q. Were they taken out at Buffalo?
A. Not while I was there.
Q. Were they taken out anywhere?
A. Yes.
Q. Where?
A. Fostoria,—somewhere in Ohio, I believe.

By Mr. Comesky:

Q. How long before you got to Buffalo?
A. About thirty-five hours.
Q. Did you look them over at Buffalo?
A. I looked through the car, they were not out of the car.
Q. Did they appear to you then to be all right?
A. The way they stood in the car, yes.
Q. When you saw them unloaded at Fostoria did you look them over?
A. Yes, they were all right then when they unloaded and reloaded.
Q. You traveled aboard that train from Fostoria to Buffalo?
A. Yes, sir.
Q. Was there any occurrence that happened to that train that was unusual at all?
A. No, sir.
Q. Now I will ask you what the value of that bay mare was if she had been sound that morning that she arrived at Suffern?
A. $250.
Q. What was her value in the condition in which you found her?
A. I sold her for $150——

The Court: No, no, what was her value that morning after this accident, after she had been hurt, what was her market value at that time?

The Witness: I don't believe a man could have sold her.

29 Q. You know what you sold her for, and you know what it cost you to put her in that condition, don't you?

A. Yes.

Q. Can't you tell us?

A. The next morning I would think $50 or $75 would have been a good price for her.

Q. But you afterwards sold her?

A. Yes, sir.

Q. And got $150 for her?

A. Yes, sir.

Q. You had kept her for two months?

A. Yes, sir.

Q. I call your attention to the third horse that was hurt, known as the black horse, which you sold to Schultz, what was the condition of that horse at the time that you shipped him?

A. He was all right.

Q. Sound?

A. Yes, five years old.

Q. How did he appear when you left him on the defendant's road that morning at Buffalo?

A. All right, every horse was in good condition when I left them.

Mr. Oakes: I move to strike that out.

Motion denied. Exception by Mr. Oakes.

Q. Did you make an examination of this horse the following morning after the accident there in Suffern?

A. Yes.

Q. What condition did you find him in?

A. He was sore across the back.

Q. How long was he disabled?

A. A month—that is, I sold him in a month after I had him.

Q. Had he fully recovered when you sold him?

A. No, sir.

Q. What was his value if sound?

A. $275.

Q. What was his value as you found him there that morning of the accident?

A. $100 I should think would have been a good price.

30 Mr. Oakes: I move to strike it out, with respect to the value of this horse, and also with respect to the value of the bay mare, on the ground that it is in excess of the allegations of the complaint and the bill of particulars.

Motion denied.

By the Court:

Q. What did you sell this black horse for?
A. $175.

By Mr. Comesky:

Q. You had to keep him and treat him for a month in order to do that?
A. Yes, sir, and I had to agree to take him back.

Mr. Comesky: We concede that we will be bound by the bill of particulars.
The Court: Yes, you cannot recover more than the sum mentioned in the bill of particulars.

Q. I call your attention to the brown mare, and I ask you how she was injured?
A. That is the one that was cut in the head, that is the one that was bleeding that night.
Q. Was it a fresh cut?
A. Yes, sir, the blood was running down.
Q. At what place was her head cut?
A. About an inch from the eye and about three-quarters of an inch above the eye.
Q. What followed that injury?
A. That turned to be an abscess, and when their veterinary examined it he lanced it and cleaned it out.
Q. How long was that horse disabled?
A. I had her a month and two days I think.
Q. What was her value if sound?
A. $275.
Q. What was her value that morning after the injury?
A. $200.
Q. What did you sell her for?
A. $235.
31 Q. You kept her a month in the stable and treated her?
A. Yes, sir.
Q. I call your attention to the black horse, where was he hurt?
A. He had his left front shoe torn off so that he had broken away the shell from the sensitive part of his foot, and had broken out a piece of the shell about two inches long and probably an inch high, and he had his tendons strained in that same leg so he was lame.
Q. Did that appear to be a fresh break?
A. Yes, sir, it was fresh, we found the shoe right where we got him in the car with a piece of the hoof fastened to it.
Q. What part of the car did you find that in?
A. The east end of the car, about half way between the door and the corner of the car.
Q. Was the tendon swollen?
A. Yes, sir.
Q. Did it continue to swell?

A. Yes it got thick and got hard.
Q. What was the value of that horse that morning if he had been sound?
A. That horse was worth $300.
Q. What was his value in the condition in which you found him?
A. $125 or $150.
Q. What did you sell him for?
A. I got $235 for him.
Q. Did you hear any outcry or warning before this collision occurred?
A. No.

Cross-examination.

By Mr. Oakes:

Q. Were you loading these horses at East St. Louis or were they loaded by the people from whom you purchased them?
A. They were loaded at East St. Louis by the Union Stock Yard people.
Q. Did you have anything to do with it?
A. No, sir.
32 Q. Where did you see the horses when you examined them before they were loaded in the car at all?
A. In the barn where I bought them.
Q. Where were their stables?
A. In the barns.
Q. In single stalls or how?
A. Single stalls.
Q. Is that where you examined them, in the stall?
A. No, out on the floor.

By the Court:

Q. Did you drive them or see them driven?
A. My son saw them driven, I done the buying and he saw them hitched and drove, and I did the examining of them.

By Mr. Oakes:

Q. You shipped them, did you?
A. Yes.
Q. You and your son?
A. Yes.
Q. Before you shipped them do you remember the signing of this contract, on some paper?
A. We always signed a contract.
Q. Of that kind?
A. Yes, I signed that, or one just like it, I guess that is the one I signed.
Q. That looks like your signature at the bottom, J. R. Shuart and Sons?

Mr. Comesky: We admit that he signed it.

The Court: For himself and the other plaintiffs?
Mr. Comesky: Yes.
Mr. Oakes: I offer it in evidence.

Admitted and marked Exhibit A.

Q. At some point in Ohio, thirty-five hours before you reached Buffalo, the horses were unloaded from this car?
A. Thirty-five hours from St. Louis.

By the Court:

Q. You were asked from Buffalo, how far is Buffalo from Fostoria?
33 A. I don't know the distance. We left Fostoria about four or five o'clock in the morning—or one o'clock in the morning, and got into Buffalo about two o'clock the next morning.
Q. A twenty-four hour run?

A. I don't know whether it was the next day—I think we left Fostoria on Saturday some time.

By Mr. Oakes:

Q. What time of day?
A. I think somewhere about one o'clock in the morning.
Q. What time did you get to Fostoria?
A. I don't know, it was in the night sometime.
Q. Do you remember how long you remained there?
A. Quite a while, I don't know just how long.
Q. One or two hours?
A. Longer than that.
Q. Four hours?
A. I guess longer than that.
Q. Who unloaded the horses and reloaded them at Fostoria?
A. The yard people.
Q. How far was this particular car of horses from the caboose, do you know?
A. No.
Q. You and your son rode in the caboose on the freight train?
A. Yes, sir.
Q. And you did that from East St. Louis to Buffalo?
A. Yes, sir.
Q. You didn't see the horses at Fostoria?
A. Yes, sir, I saw them unloaded and reloaded—I saw them on the platform when they were unloaded.
Q. Were they unloaded from the car down the cattle chute to the pen?
A. It is a cattle chute, but they are unloaded out there on a wide platform, and they go from one pen to another, they are put in separate pens.
Q. When you reached Buffalo it was daytime—or was it at night?
A. About two o'clock in the morning.
Q. You came in over the Nickel Plate Road, did you?

A. Yes, sir.
Q. You came in to East Buffalo, didn't you?
A. No, we came in to Buffalo.
34 Q. Where did you leave the car?
A. Right there and what we supposed was the yardmaster's office.
Q. What railroad?
A. The Erie.
Q. Where did you go when you got off the caboose?
A. We got a trolley and went down to the Erie station.
Q. What trolley?
A. I don't know.
Q. Do you remember what street you went on?
A. No.
Q. Do you know how far you rode after you got off the caboose until you got to the Erie station?
A. I don't know.
Q. Can you tell me the amount of time it took?
A. No.
Q. Was it fifteen minutes or was it an hour?
A. I couldn't say that, I don't know.
Q. You don't know whether this car was actually in the custody of the Erie Railroad when you left it or not, do you?
A. Only what the trainmen told me, that is all.
Q. The last train crew that you saw or talked to was the train crew of the Nickel Plate Railroad, wasn't it?
A. Yes, sir.
Q. When you left that caboose was that train of the Nickel Plate Railroad all coupled up together?
A. The engine and caboose was taken away.
Q. But the train, with that exception, was left on the same track?
A. Yes, sir.
Q. Then after that what became of that train and that particular car you don't know, except that it was transported to Suffern?
A. It was standing there when I left it.
Q. What became of it after that you don't know?
A. I don't know.
Q. Except that it was transported to Suffern?
A. No.
35 Q. How far was that car in which these horses were shipped from caboose when you left the train at Buffalo?
A. That I couldn't say, I don't know.
Q. Do you know where the caboose was taken off—were you in the caboose when it was disconnected from the train?
A. We got out as soon as the train stopped, and they said that was the end of our journey, and I asked them where the Erie office was, and the man took me with a lantern and went to this office, and the train was there, as I suppose, turned over to the Erie, that is all I know about it.
Q. Did your son go with you?
A. Yes, sir.

Q. You went directly from this caboose to what you supposed was the Erie yardmaster's office?

A. No, I didn't go directly from the caboose, we went up to where our horses were and got a lantern and looked through the car of horses to see if they were all right, and then went to the office.

Q. Your testimony with respect to the condition of the horses at that time is based upon what you could see at night through the slats of the car?

A. Yes, we didn't go in the car with them.

Q. And you didn't go in the car at Suffern, did you?

A. No.

Q. And in fact you didn't see these horses when they came out of the car?

A. At Suffern?

Q. Yes?

A. No, sir.

Q. Do I understand that you did see one horse that night?

A. I saw all the horses that night as they stood in the stalls, but I only looked at one horse.

Q. Did you go back into the horse car that night after they had been unloaded at Suffern?

A. Yes.

Q. What time?

A. Near morning, I don't know what time it was, probably close to five o'clock.

Q. This occurrence that you speak of was in the neighborhood of three or four o'clock on the morning of April 9th?

A. Somewhere about three o'clock.

Q. April 9th?

A. Yes, sir.

36 Q. The afternoon of the 9th did you go to see the station agent, Mr. Udder?

A. I think I went to see the man in the freight office, I don't think I saw Mr. Udder then, I saw Mr. Udder in the morning.

Q. Some time that day you went there to the freight office of the station, or somewhere in Suffern, and signed that paper, didn't you—is that your signature?

A. Yes, I signed that, but not with Mr. Udder, with a young fellow in the freight office.

Q. That is your signature?

A. Yes, sir.

Q. And that is your signature?

A. Yes.

Mr. Oakes: I offer these three papers in evidence.

Marked Exhibits B, C and D.

By the Court:

Q. When were these signed?

A. The morning of the 9th.

Q. After the horses were taken out?

A. Yes, sir.
Q. When was the freight paid?
A. $150 was paid on the 8th.
Q. Before the car arrived?
A. Yes, and we agreed if anything more was coming we would pay it, and so I went down to the freight office and told them that I had called up Mr. Comesky, and I still owed them $36, according to the freight bill, and that is when I signed those papers.
Q. Did you pay the $36?
A. Not that day, Mr. Comesky told me not to pay it, and then Mr. Udder came to see me and he said if I didn't pay it he would have to, and he didn't have the money and would have to borrow it. I told him that my lawyer told me not to pay it, and I said, "I will loan you the $36," and I did, and he didn't have to go anywhere else for it.

By Mr. Oakes:

Q. You said you went to Mr. Udder a few days after this occurrence and told him something about the horses being hurt, some of them?
A. Yes, sir.
37 Q. How many times did you go to see him for that purpose?
A. I think I went to see him twice.
Q. Each time you told him about it?
A. Yes, sir.
Q. Did you ever make out any paper and hand it to him or to the railroad company, with respect to the damage of these horses?
A. No, sir.
Q. You never filed any complaint?
A. No, sir.
Q. Or made any affidavit in which you set forth the damage to the horses?
A. No, sir.
Q. And never had anybody do it for you?
A. No, sir. I don't know what my sons did, but I didn't.

Mr. Comesky: Do you admit the payment of the freight?
Mr. Oakes: We have not denied it.

JAMES G. HUNTER, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Comesky:

Q. You live in Suffern?
A. I do.
Q. Were you present when this car of horses arrived there the night of the accident?
A. I was.

Q. At what place were you?
A. I was on the west side of the chute on the platform.
Q. Holding the west gate?
A. I wasn't when they arrived.
Q. But afterwards?
A. Afterwards——

By the Court:

Q. After the car was placed at the chute and the bridge put down?
A. Yes.

By Mr. Comesky:

Q. Did you see the conductor there while the car was being placed?
A. I did.
38 Q. And while the bridge was being put down?
A. Yes.
Q. While he was standing there did you see Mr. Shuart and others undertake to get the car door open and unload the horses?
A. Yes.
Q. Did you hear any conversation between Mr. Shuart and the conductor about unloading them?
A. Yes.
Q. What?
A. Mr. Shuart told him to place the car so they wouldn't have any trouble to get the bridge down, that they had no pinch bar to pinch the car into place, when they were placing it, he asked him, "Will that suit you?" he said, "Yes." The conductor said, "You had better get them out because they have been a long time on the road."
Q. Did Mr. Shuart and the others start at once to get the door open?
A. They did.
Q. While the conductor was standing there?
A. Yes.
Q. Did you see what the conductor did and where the engine went?
A. The engine went west.
Q. Did the conductor disappear somewhere?
A. Yes.
Q. While you were there, and while the work was going on around this car, by Mr. Shuart and his men, did you hear the locomotive pass from the west to the east over the branch track?
A. I did.
Q. Then did you hear it doing some switching off up to the east when you were working there?
A. Yes, I heard the engine up that way.
Q. While you were there at the car, and just before the horses were led out, what was the position of Mr. Shuart and Leo?
A. I didn't see the horses led out.
Q. When you finally got ready to take the horses out did Mr.

Shuart and his son Leo—were they standing on the bridge holding each two horses?

A. Yes.

Q. At that moment what happened?

A. There came a crash that drove the car.

39 Q. It drove the car of horses toward the west?

A. Yes.

Q. And how far was it driven?

A. Two feet, just about three feet, somewhere around there, I couldn't say exactly.

Q. Did you notice what happened to the horses in the car at the time of the crash?

A. They went back to the east.

Q. Did you afterwards observe what had caused the crash?

A. I didn't see it, no, only what I was told.

Q. Did you observe that a car had come against this car of horses?

A. Only what they told me, I didn't see that, only that the car went down and there was a crash.

Q. A loud crash?

A. Yes, quite a crash.

Q. Did the horses in the car make much noise?

A. They made quite a noise, yes.

Q. You left before the horses were taken out?

A. Yes, sir.

By a Juror:

Q. Were the horses tied or loose in the car?

A. Loose.

By the Court:

Q. Were they al- together or separated by partitions?

A. All in together.

Cross-examination.

By Mr. Oakes:

Q. Each had a halter on and then a short strap—how long was the strap hanging to the halter?

A. A rope tied up and twisted around, I should judge, so long (indicating).

Q. Ten or twelve inches?

A. Somewhere around there.

40 By the Court:

Q. Were they fastened together?

A. No, they were loose and had a halter with a lead to it, and that lead was twisted around and somehow tied so as to leave it so long.

Q. But not fastened to the car?

A. No.

By Mr. Oakes:

Q. That rope after it was tied up hung down loose from the halter?
A. Yes.
Q. To the extent of about a foot?
A. I judge so, I couldn't say how long.

JOHN SHUART, JR., called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows:

Direct examination.

By Mr. Comesky:

Q. You are a son of John R. Shuart?
A. Yes, sir.
Q. Were you at Suffern on the morning when this car arrived?
A. Yes, sir.
Q. Where did you stand?
A. At the bottom of the chute.
Q. Were you working around there until the time the accident happened?
A. Yes, sir.
Q. Did you see the conductor when the car was placed?
A. Yes, sir.
Q. Where was the conductor?
A. He stood up in the chute with my father.
Q. Did you hear your father giving directions as to the placing of the car?
A. Yes, sir.
Q. Did you see the conductor there until the car had been placed?
A. Yes, sir.
Q. Were the brakes set upon the horse car?
A. Yes, sir.
41 Q. Did the conductor remain there until you had started to open the door?
A. He did.
Q. Did you observe what happened at the time of the crash—did you hear a crash when you were unloading your horses?
A. Yes, sir.
Q. What caused the crash?
A. Three or four box cars and the engine on the easterly end.
Q. Did you observe a car that came down against your car?
A. Yes, sir.
Q. Did you look at the train to the east afterwards to see whether there were other cars standing off to the east?
A. Yes, sir.
Q. Was there an engine on the same switch track?
A. Yes.
Q. Were all these cars coupled up from your box car to the engine?
A. Yes, sir.

Q. Did you remain there until your car was pulled back into place?

A. Yes, sir.

Q. After the crash was your car coupled up to the other cars?

A. It was.

Q. Did you observe in which direction the horses went, or whether they moved in the car at the time of the crash?

A. They went in the easterly end.

Q. Was it a loud crash or a light one?

A. A loud one.

Q. Did you hear any movement or stamping of the horses?

A. Yes, the horses by the door, I could see them going to the easterly end when they were hit.

Q. Who unloaded the horses?

A. Some of the trainmen.

Q. Were you there when they were unloaded?

A. Yes, sir.

Q. Did you attend to stabling them?

A. Yes, I stood up on the chute and handed them to the other men.

Q. Did you examine the horses when you got them into the stable?

42 A. I didn't examine any of them. I saw the two that Hunter had when they went up the road, they were a little lame, and the dark bay was cut over the eye.

Q. That is the one you told your father about?

A. Yes, sir.

Q. Did you look at them the next day with your father?

A. I think I watched the sorrel mare's front leg, where she was skinned.

Q. Can you tell us how the sorrel mare was hurt?

A. Not just exactly, no.

Q. Do you remember how the bay mare was hurt?

A. The dark bay you mean?

Q. One of the bays?

A. One was hurt in the shoulder.

Q. Do you remember where the black horse was hurt?

A. In the back.

Q. Do you remember how long he was disabled before he was sold?

The Court: Will there be any dispute by the other witnesses as to those details, as to how long the horses were kept before they were sold?

Mr. Oakes: Not any thing serious, I may have some questions as to the value, perhaps not any.

Cross-examination.

By Mr. Oakes:

Q. Are you John Shuart, Jr.?

A. Yes, sir.

Q. Did you testify in the trial of the case of Leo Shuart, your brother's case, against the Erie Railroad?
A. Yes, sir.
Q. You are one of the plaintiffs in this action?
A. Yes, sir.
Q. Did you ever file any verified claim with the Railroad company for any damages to these horses?
A. No.
43 Q. Do you know whether your brother Leo did?
A. I don't know.

Mr. Comesky: No, he did not.

Q. Do you say that the conductor and the railroad men unloaded these horses?
A. I think it was Mr. Welch, some of his crew there let the horses down to the bottom of the chute to us, that is, let them come down loose.
Q. Did you say you wouldn't unload them, is that the reason they did?
A. Father gave them the orders.
Q. And they delivered the horses to you on the ground there?
A. Yes.
Q. At the foot of the chute?
A. Yes.
Q. And you took them from there into the barn?
A. Yes, sir.

Mr. Comesky: We rest.
Mr. Oakes: May it please the Court, we move for a non-suit, first, on the ground that there is no evidence here of negligence on the part of the defendant; and, second, there is no proof here that the accident, or the movement of the car alleged in the complaint, caused the damage complained of to these horses. Third, that the defendant by this contract had been released and absolved by the live stock contract signed by the plaintiff—has been released and absolved from any liability for damages as claimed in the complaint. Next, that no verified claim with respect to the damages sustained by the plaintiffs was ever filed by any of the plaintiffs with the defendant within the period of five days from the time that this damage occurred as provided by this live stock contract signed by the plaintiffs.

Motion denied.
44 Exception by Mr. Oakes.

Mr. Oakes: I offer this certified copy filed with the Interstate Commerce Commission.
Mr. Comesky: Such part as applied?
Mr. Oakes: Yes.
The Court: You may use such part as applies.
Marked Exhibit E.

Testimony closed.

Mr. Oakes: I renew my motion for a nonsuit and for a dismissal of the complaint, first on the ground that there is no evidence here of negligence on the part of the defendant; second, there is no proof here that the accident, or the movement of the car alleged in the complaint, caused the damage complained of to these horses; third, that the defendant by this contract has been released and absolved by the live stock contract signed by the plaintiff—has been released and absolved from any liability for damages as claimed in the complaint, next, that no verified claim with respect to the damages sustained by the plaintiffs was ever filed by any of the plaintiffs with the defendant within the period of five days from the time that this damage occurred as provided by this live stock contract signed by the plaintiffs.

Motion denied.
Exception by Mr. Oakes.

Mr. Oakes: And upon the same grounds we ask the Court to direct a verdict for the defendant.

Motion denied.
Exception by Mr. Oakes.

45 Mr. Bright, on behalf of the defendant, and Mr. Comesky, on behalf of the plaintiffs summed up the case to the jury.

The Court: Did Mr. Shuart testify whether he read the printed part of the receipts or not?
Mr. Oakes: Not a word.
The Court: You had better recall him and ask him.

JOHN R. SHUART, recalled for further examination, testified as follows:

By Mr. Comesky:

Q. At the time you signed these receipts, did you read or have your attention called to the words "in good order" on those receipts?
A. No, sir.
Q. Did you know those receipts contained those words?
A. I did not.

By the Court:

Q. What were you told, if anything, about those papers?
A. I think the original bill—if the original bill is produced, it is marked on there that there was a claim against the horses—that is the bill I signed and the bill they marked and gave me isn't that kind of a bill.
Q. Where is that?
A. I gave it to my lawyer. It wasn't a claim for damages, but it was freight charges, and those freight bills, were signed something like two weeks——

Mr. Bright: We object, and move to strike it out.

The Court: Yes.

Q. When did you sign these receipts?
A. About two weeks after.
46 Q. Two weeks after the accident?
A. Yes.
Q. What were you told about the papers?
A. Nothing at all.

Mr. Bright: We object to it as incompetent and irrelevant.

Objection overruled. Exception by Mr. Bright.

Q. Who asked you to sign these papers?
A. The freight agent.

Mr. Bright: We make the same objection, and move to strike it out.

Motion denied. Exception by Mr. Bright.

Q. What did he say to you when he asked you to sign them?
A. I loaned him $36——
Q. Never mind what you loaned him, what did he say when he asked you to sign these receipts?

Mr. Bright: We object to any statement on the part of the freight agent.

Objection overruled. Exception by Mr. Bright.

Q. When the agent two weeks after this accident asked you to sign these papers what did he say as to what the papers were?
A. He wanted the freight bills signed so he could turn them in, and I signed them, they had been paid before, but we hadn't got them.

Mr. Bright: I move to strike out the answer, upon the same grounds.

Motion denied. Exception by Mr. Bright.

Q. How long were these papers in your possession—did you have them in your hands at all?
A. No, sir.
Q. You signed them where?
A. In the freight office.
47 Q. You only saw them long enough to sign them?
A. Yes.
Q. And left them with the agent?
A. Yes, sir.

By Mr. Bright:

Q. You have signed a great many of these?
A. Yes.

Q. During your experience in the livery business?
A. Yes.
Q. You have signed them on every shipment of horses that you received from the time you have been in the livery business?
A. Yes.
Q. You never read them?
A. No, sir, I never read one in my life.
Q. Do you know what has been in the receipts that you signed before?
A. No, sir.

Judge's Charge.

TOMPKINS, *J.:*

Gentlemen, the Erie Railroad Company brought the plaintiff's carload of horses from Buffalo to Suffern, and at Suffern the car was detached from the other cars and put on a siding, and placed alongside of the cattle chute, down which the horses were to be led from the car to the ground.

This car that contained the horses was so placed that the side door through which the horses were to be led out of the car was alongside of the cattle chute, and a bridge that was attached to the side of the cattle chute was lowered into the car, through the open door, so that it rested upon the floor of the car.

It appears, without dispute, that the car was so placed by the conductor, or under the orders of the conductor, and that he advised the plaintiff to remove the horses at once, and that after the
48 car was so placed, and after the plaintiff had undertaken to open the car door, after the bridge was in position so that the horses could be led out, and the sides had been placed so that the horses could not fall, or jump, on either side—after it was all in readiness, and the door was about to be opened, the conductor left the car and went away and that being so, the law required that the defendant should afford the plaintiffs reasonable time and opportunity to remove the horses from that car in safety; it was the defendant's duty to refrain from any careless act that would do injury to the horses or to the men who were engaged in unloading them, while they were being unloaded from the car.

The plaintiff's claim is that the railroad company was negligent and careless in causing, or permitting, another car or other cars, to back up against and come into collision with this car and move it about three feet from the position in which it had been placed by the conductor for the plaintiff's use.

The testimony is that just as the plaintiffs were about to lead out one of these horses, after the door had been opened, some twenty minutes or half an hour after the car had been placed there, there was a loud crash, a violent movement of this horse car towards the west; that although the breaks had been set, it was moved by the force of that collision about three feet, and the plaintiffs' claim is that that was a careless and negligent thing for the railroad company to permit, after it was known where the car was, and when it was known that the plaintiffs were engaged in taking the horses out.

The first question is, was there any negligence on the part of the railroad company, as a result of which the collision happened? Was the railroad company to blame? Was the railroad company careless in causing, or permitting, these other cars to collide with the car that had the horses in it?

49 If there was negligence on the part of the railroad company in that respect, the next question is whether that collision did any injury to these horses. Was there any damage done to the horses by that collision? Of course, if the horses were not injured, if no horse was damaged, as the result of that sudden movement of the car, there can be no recovery in this case. If the horses were injured before the car reached Suffern from any cause, no matter what, the plaintiffs cannot recover in this action, because under this contract, which Mr. Shuart signed, he agreed that for any damage that might be done to the horses while they were actually being transported he would make a written and verified claim and serve it upon some official of the railroad company within five days, and it is admitted that no such claim was made, no verified statement was ever presented to any officer of the railroad company, and besides that, the shipping contract places a limit upon the liability of the railroad company, limiting the plaintiffs' right of recovery to not more than $100 for any horse, no matter how valuable it may have been, or how much damage was done. For the reason that no verified claim was filed with the railroad company, the plaintiffs cannot recover for any injury that might have been done to the horses while they were being actually transported, and the plaintiffs cannot recover in this suit unless some damage was done to these horses by reason of that collision that occurred after the actual transportation was over, and the car had been placed there alongside of the cattle chute to enable the plaintiffs, whose duty it was under this contract, to remove the horses from the car.

So that the question is, first, was there negligence on the part of the railroad company in operating their cars in that yard so as to cause this collision? If there was, the question is, did that collision do some actual injury to one or more of these horses. If it

50 did not, if there was no damage done by the collision to any horse, your verdict will be for the defendant. If the horses were damaged, if some of them were injured, and the defendant was negligent, the plaintiffs are entitled to recover the difference between the market value of the horses immediately before the collision and their market value immediately after—not the difference between the value before the collision and a month or two months after, when they had been doctored and cured, but the difference in the value immediately before and immediately after they were hurt.

The plaintiffs have served a bill of particulars in this case, stating the items of their claim, and the exact damage that it is claimed they suffered. By the bill of particulars the plaintiffs' claim is limited as follows: Damage to sorrel mare, $135; damage to bay mare, $150; to black horse, $125; to brown mare, $65; black horse, $67.50. Making a total of $542.50.

With respect to the first horse, the sorrel mare, for which in the bill of particulars the plaintiffs ask for $135, it appears by Mr. Shuart's testimony that that horse was worth before the accident $275, and was sold for $165, which would make a difference of $110, and he gave no other testimony respecting that horse. The black mare he testified was worth $250 before the accident and $75 afterwards, making a difference of $175. But he sold the horse later for $150, making a difference of $100 only. In this connection, you are to remember what I have already said, that the damage is to be determined by the difference between the value of the horse immediately before and immediately after, not a month or two months later, because the plaintiffs were required to give some attention and treatment to the horses, and put them in condition before they sold them for the prices that they realized.

51 The black horse, Mr. Shuart says, was worth $275 before the accident and only $100 after, but he sold him for $175. The brown mare, he says, was worth $275 before the accident and $200 after, but he got $235 for it. The other black horse, he says was worth $300 before the accident and $150 after, and for that horse he also realized $235.

So, gentlemen, you are to take all these figures, and determine what damage the plaintiffs suffered by reason of this collision, if you find that the horses were injured as the result of that collision and the collision was the result of negligence on defendant's part. You cannot exceed, however, the amount fixed by the plaintiffs in their bill of particulars, nor are you bound by the testimony of the plaintiffs respecting the value of these horses before and after the accident. Mr. Shuart is an interested party, and you are not bound by his testimony respecting these values, but you are to consider that testimony as to the injury done to the horses, and then applying your own knowledge and judgment, say how much, as a matter of fact, the plaintiffs really suffered in money loss by reason of the collision, if the horses were injured in the collision.

Gentlemen, the burden of proof rests upon the plaintiffs, and that means that the plaintiffs must satisfy you by a fair preponderance of the evidence—that is, by the greater weight of testimony, first, that there was carelessness on the part of the railroad company; and second, that these horses were actually injured by that collision, and third, the plaintiffs must satisfy you as to the actual injury done, and the damage sustained by them as the result of the collision.

You are not to give the plaintiffs any more, gentlemen, because this defendant is a railroad company, than you would give if an individual was being sued. The plaintiffs are entitled to their actual damage, and no more, and not one dollar, or penny, is to be

52 added to any recovery that the plaintiffs may get because the defendant is a railroad company. The plaintiffs are entitled to no more against this defendant than they would be if they were suing some individual who ran into their horses, or in some way injured their horses, on the public highway. It is simply a question of actual money loss. No one is to be punished by your verdict, but at the same time, the plaintiffs are to be made whole, and are to be given reasonable and adequate compensation for their actual loss, if

you find that these horses were injured by reason of the negligence of the railroad company after the car had been placed there by the cattle chute.

Mr. Bright: We ask your Honor to charge the jury that the items read from the bill of particulars are not evidence of the amount of damage, but it is merely a limitation.

The Court: It is an amount beyond which the jury cannot go.

Mr. Bright: We ask your Honor to charge that there is no proof in this case that the accident — occurred to the horses did not occur between Buffalo and Suffern.

The Court: I will leave it to the jury to say. The evidence is that the horses were thrown by the force of this collision against each other, and up against the east end of the car, and there is testimony to the effect that the wounds were recently made, and from one horse there was blood running from a fresh cut, and from that the plaintiffs ask you to find that the injuries were caused at the time of the collision, and not before.

Mr. Bright: We take an exception, and ask your Honor to charge the jury that the burden is upon the plaintiffs to show that the horses were not injured upon the journey prior to the time that this car was placed at the cattle chute.

53 The Court: Yes.

Mr. Bright: I ask your Honor to charge the jury that John R. Shuart is presumed to have known what he was signing at the time he signed these three receipts in evidence.

The Court: I refuse that.

Exception by Mr. Bright.

Mr. Bright: We except to your Honor's charge that the defendant was bound to afford the plaintiffs reasonable opportunity to remove the horses from the car in safety; and we also except to your Honor's charge to the jury that it was the defendant's duty to refrain from any careless act that would do injury to the horses while they were being unloaded by the plaintiffs or whatever your Honor said in that connection; and we also except to anything that you may have said in your charge on the subject that the horses were unloaded by the plaintiffs.

The Court: I said that under the contract it was the plaintiff's duty to unload them.

Mr. Bright: Does that provision of the contract apply to this unloading at the time of the collision?

The Court: I so hold, yes. The actual transportation had ended, and the only thing that remained to be done, under the contract, was the work that the plaintiffs had to do. The defendant's work was over.

Mr. Bright: I ask your Honor to charge that under the terms of the contract the unloading of these horses was at the plaintiff's own risk, and the defendant was absolved from any liability that occurred from that unloading.

The Court: Refused.

Exception by Mr. Bright.

Mr. Bright: I also except to your Honor's construction of the live-stock contract relating to the five days' notice provision, and I ask your Honor to charge the jury that the sale price of the
54 horses may be taken into consideration in determining the amount of damage, if any, that was done.

The Court: Yes, all those things are to be considered on the question of the actual damage.

Mr. Bright: I ask your Honor to charge that there can be no damages for the care and treatment given the horses by the plaintiff.

The Court: I charge that.

The jury retired, and returned with a verdict in favor of the plaintiffs, and assessed the damages at $375.

DEFENDANT'S EXHIBIT A.

Toledo, St. Louis & Western Railroad Company.

Clover Leaf Route.

Traffic Department.

Live Stock Contract.

No.—. National Stock Yards, Ill.,

Station, 4-4, 1912.

This agreement, made this 4 day of April 1912 by and between Toledo, St. Louis & Western Railroad Company hereinafter called the carrier, and Holland Nugent Maxwell Bros. hereinafter called the shipper. (Shipper's Name)

Witnesseth: That said shipper has delivered to the said
55 carrier, live stock of the kind and number, and consigned and destined by said shipper as follows:

Consignee, destination, etc.	Number and description of stock. (Shipper's load and count.)	Weight subject to correction.
J. R. Shuart & Sons, Suffern, N. Y.	22 horses.	

Advance Charges, $100 Bed. 340 Hay.

Car numbers and initials 67986 Erie for transportation from National Stock Yards, Ill., to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the

following terms and conditions which are admitted and accepted by the said shipper as just and reasonable, viz:

That said shipper or the consignee, is to pay freight thereon to the said carrier at the rate of — per tariff, which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable, in any event, whether the loss or damage occur
56 through the negligence of the said carrier or connecting carriers, or their employees or otherwise.

If horses or mules—not exceeding one hundred dollars each.

If cattle or cows—not exceeding seventy-five dollars each.

If fat hogs or fat calves—not exceeding fifteen dollars each.

Feed & water at Fostoria, O.

If sheep, lambs, stock hogs, stock calves, or other small animals—not exceeding five dollars each.

And in no event shall the carrier's liability exceed 1,200 upon any carload.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or
57 any connecting carrier shall not be liable on account of the escape of any of said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes, or stoppage of labor, or from causes beyond their control.

That in the event of any unusual delay or detention of said live stock caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby, the amount actually expended by said shipper in the purchase of food and water for the said stock while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any Court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the General Auditor of the said carrier at his office in the City of Chicago, Ill., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier, on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the
58 caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause and neither the said carrier, nor its connecting carriers shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock, to take care of the same under this contract.

And it is further agreed by said shipper that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge, other than the sum paid or to be paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier and every connecting carrier from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier or of any of its or their employees or otherwise.

And Holland Nugent Maxwell Bros., (Shipper's name.) do Does (Does or do.) hereby acknowledge that Does (He or they.) had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said live stock upon their respective roads and lines, but ha- Has (Has

59 or have) voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY.
By E. McGRAW,
L. S. A.,
Station Agent.

Witness my hand:

J. R. SHUART & SONS, *Shipper,*
By —— ——, *Shipper's Agent.*

—— ——,
—— ——,
Witness.

(See Back for Release for Man in Charge.)

(On Back.)

Release for Man or Men in Charge.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the Live Stock mentioned in said contract, of which Live Stock I (I am or we are) in charge, the undersigned do Does (Does or do) hereby voluntarily assume all risk of accidents or damages to His (His or their) person or property, and does (Does or do) hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of said carrier or carriers, or any of its or their employees or otherwise.

J. R. SHUART.
Signature of Man in Charge.

S. H. PHILLIPS, *Witness.*

60 (Endorsed as follows:)

Toledo, St. Louis & Western Railroad.

Clover Leaf Route.

Traffic Department.

Live Stock Contract.

From National Stock Yards, Ill.
To Suffern, N. Y.
Via N. Y. C. H. Erie.

Date 4-4-12.
Shipper H. N. Maxwell Bros.
Consignee J. R. Shuart & Sons.
W. B. Nos. T. S. 12.
Car Nos. 67986 Erie.

Parties actually in charge of and accompanying within named stock are required to write their own names in ink here.

J. R. SHUART.

Men in charge *has* written their names above.

E. McGRAW,
L. S. A.,
Forwarding Agent.

—— Station.

NOTE.—Agents will permit only the signature of owners or bona fide employees, who accompany the stock to be entered on back of contract, without regard to passes allowed by number of cars, and run a pen through the remaining lines.

I hereby sign my name as a means of identifying myself as original signer of this Contract.

Agents will fill in the blank spaces in face of contract in accordance with rates, weights and conditions, as provided in tariffs and classifications, or such instructions as may be issued from time to time.

The names of persons who are actually entitled to pass free with stock must be entered on the waybill, and which, when cer-
61 tified to by the agent, is the authority for the conductor to pass them.

No Return Passes Will Be Given.

Agents will permit only the names of owners or bona fide employees who accompany the stock to be entered on way bill without regard to passage allowed by number of cars.

Agents are expected to adhere strictly to the rules in regard to the loading of mixed cars of stock, checking of shipments, examination of car and doors, and the affording of proper facilities for the care of stock to parties in charge of same.

This contract must be signed in duplicate in all cases; the shipper to retain one marked across the face "Copy," the other to be forwarded to the Comptroller, Chicago, Ill.

DEFENDANT'S EXHIBIT B.

Delivery Receipt — Pro Number.
Consignee J. R. Shuart & Sons — Suffern, N. Y. Station 2043
..... — Date of Arrival 4 the 9 1912
Destination ..... — Date of W.-B. 4-3. W. B. No. 12
Via ..... — Car Initials E. Car No. 67986
Received of — Consignor .....
Erie Railroad Co., — Original Point of Shipment.....

In good order the following described property from Natl. Stock Yds. Via.....

packages.	Articles and marks.	Weight.	Rate.	Amount.
22	Horses	24,200	65	$157.30
	Bedding			1.00
	Hay			3.40
	Total			161.70

(One Dead Horse in car at Buffalo.)
(Feed & Water at Fostoria, O.)

Drayage —.

Original Date of Shipment....., 191..
Original Car, Initials and Number.....

J. R. SHUART, *Consignee.*

.....the...., 191..

Receipt must be signed on delivery of freight.

62 DEFENDANT'S EXHIBIT C.

Delivery Receipt — Pro Number.
Consignee J. R. Shuart & Sons — Suffern, N. Y. Station 497
Destination ..... — Date of Arrival 4 the 9 1912
Via ..... — Date of W.-B. 4-8. W.-B. No. 2206
Received of — Car Initials E. R. R. Car No. 67986
Erie Railroad Co., — Consignor .....
Original Point of Shipment.....

In Good Order the following described property from East Buffalo via N. Y.

No. of packages.	Articles and marks.	Weight.	Rate.	Amount.
22	H Leigh Feed.....			3.00
	Crandalls			19.20
	Total			22.20

Drayage —.

Original Date of Shipment....., 191..
Original Car, Initials and Number.....

J. R. SHUART, *Consignee.*

.....the...., 191..

Receipt must be signed on delivery of freight.

DEFENDANT'S EXHIBIT D.

Delivery Receipt
Consignee J. R. Shuart
.....
Destination .....
Via .....
Received of
Erie Railroad Co.,

Pro Number.
Suffern, N. Y. Station 2044
Date of Arrival 4 the 9 1912
Date of W.-B. 4-6. W.-B. No. 3.
Car Initials E. Car No. 67986
Consignor .....
Original Point of Shipment.....

In good order the following described property from Fostoria, O.
Via.....

No. of packages.	Articles and marks.	Weight.	Rate.	Amount.
22	Horses Feed & Yardage.....			$3.00
	Total			.....

(One Dead Horse in Car, Buffalo, N. Y.)
(Not aliv- Feed & water at Fostoria, O.)
Fed-Water-Rested & Loaded 1:30 A. M. 4/6/12.
(36 Hours' Request.)

Drayage —.

Original Date of Shipment....., 191..
Original Car, Initials and Number.....

J. R. SHUART, *Consignee.*

.....the...., 191..

Receipt must be signed on delivery of freight.

63 *Stipulation.*

It is hereby stipulated that Defendant's Exhibit E, which is a certified copy of the official classification as filed with the Interstate Commerce Commission, be filed with the Appellate Division on the argument of this appeal, in lieu of the printing of the said exhibit in this record.

It is hereby stipulated that the above named Defendant's Exhibit E be filed with the Court of Appeals on the argument of this appeal in lieu of the printing of the said exhibit in this record.

FRANK COMESKY,
Atty. for Plffs.

WATTS, OAKES & BRIGHT.

The foregoing case and exceptions and exhibits contain all the evidence introduced and proceedings had upon the trial of this action.

64 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, Second Judicial Department.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs-Respondents,

against

ERIE RAILROAD COMPANY, Defendant-Appellant.

STATE OF NEW YORK,
County of Orange, ss:

Elbert N. Oakes, being duly sworn, says that he is one of the attorneys for the defendant in the above entitled action and was present at the trial thereof; no opinion whatsoever was rendered by the trial court.

ELBERT N. OAKES.

Sworn to before me this 16 day of June, 1914.

E. JOSEPHINE CORWIN,
Notary Public.

65-66 *Order Settling Case.*

The foregoing case on appeal containing all the evidence is hereby settled and ordered on file in the office of the Clerk of the County of Rockland and in the office of the Clerk of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

Dated, June 16, 1914.

ARTHUR S. TOMPKINS,
Justice Supreme Court.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal from judgment and order, summons,

complaint, amended answer, bill of particulars, clerk's minutes of trial, judgment, order denying motion to set aside verdict and for new trial, and the case and exceptions as settled, and the whole thereof, now on file in the office of the Clerk of the County of Rockland, and certification thereof by the Clerk of said county, pursuant to Section 1353, is hereby waived.

Dated, June 16th, 1914.

FRANK COMESKY,
Attorney for Planitiffs.
WATTS, OAKES & BRIGHT,
Attorneys for Defendant.

67 *Order of Affirmance.*

At a Term of the Appellate Division of the Supreme Court, Held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 11th Day of December, 1914.

Present:

Hon. Joseph A. Burr,
" Edward B. Thomas,
" Adelbert P. Rich,
" Luke D. Stapleton,
" Harrington Putnam,
Justices.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, etc., Respondents,

vs.

ERIE RAILROAD COMPANY, Appellant.

Order of Affirmance on Appeal from Judgment.

The above-named Erie Railroad Company, the defendant in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Rockland on the 12th day of December, 1913, and from an order made by said Court denying a motion for a new trial therein, and the said appeal having been submitted by Mr. Elbert N. Oakes, of counsel for the appellant, and by Mr. Frank Comesky, of counsel for the respondents, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby unanimously affirmed; and that the respondents recover of the appellant the costs of this appeal.

Enter,

JOS. A. BURR, *Acting P. J.*

68 Supreme Court, Appellate Division, Second Judicial Department.

Clerk's Office, Borough of Brooklyn, N. Y.

I, John B. Byrne, Clerk of the Appellate Division of the Supreme Court in the Second Judicial Department, do hereby certify that the foregoing is a copy of the order made by said Court upon the appeal in the above-entitled action, and entered in my office on the 11th day of December, 1914, and that the original case upon which said appeal was heard *are* hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at the Borough of Brooklyn, this 11th day of December, 1914.

[SEAL.] JOHN B. BYRNE, *Clerk.*

69 *Judgment of Affirmance.*

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

vs.

ERIE RAILROAD COMPANY, Defendant.

Judgment, Dec. 15, 1914.

A judgment in this action in favor of the plaintiffs and against the defendant, having been rendered in this Court on the 12th day of December, 1913, upon a verdict of a jury, for damages in the sum of $375 found by said jury, together with the sum of $101.07, costs, making in all the sum of $476.07, and the defendant having appealed from said judgment to the Appellate Division of the Supreme Court, of the Second Judicial Department, and an order having been made by the said Appellate Division, unanimously affirming said judgment with costs of said appeal, and the said costs having been taxed at the sum of $96.57,

Now, on motion of Frank Comesky, attorney for plaintiffs, it is

Adjudged, that the judgment entered herein on the 12th day of December, 1913, be and the same is hereby affirmed and that plaintiffs do recover of the defendant $96.57 the costs and disbursements of their appeal herein, and that they have execution therefor.

Judgment signed this 15th day of December, 1914.

J. W. SHERWOOD, *Clerk.*

70 *Notice of Appeal to Court of Appeals.*

Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

against

ERIE RAILROAD COMPANY, Defendant.

SIRS: Please take notice that the defendant, Erie Railroad Company, hereby appeals to the Court of Appeals of the State of New York, from the judgment entered in the office of the Clerk of Rockland County, on December 15, 1914, which said judgment awarded to plaintiffs and against the defendant, the sum of $96.57, costs, and which said judgment affirmed the order denying defendant's motion for a new trial and also affirming the judgment entered in said Rockland County Clerk's office on December 12, 1913, in favor of plaintiffs and against defendant for the sum of $476.07, and defendant appeals from each and every part of said judgment entered in the office of the Clerk of Rockland County, on December 15, 1914, as well as from the whole thereof.

Dated, February 1, 1915.

WATTS, OAKES & BRIGHT,
Attorneys for Defendant.

Office and Post Office Address, 4 East Main Street, Middletown, New York.

71 To Jonathan W. Sherwood, Clerk of Rockland County; Frank Comesky, Esq., Attorney for Plaintiffs, Nyack, New York.

Affidavit of No Opinion.

Supreme Court, Appellate Division, Second Department.

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs-respondents,

against

ERIE RAILROAD COMPANY, Defendant-appellant.

STATE OF NEW YORK,
County of Orange, ss:

Elbert N. Oakes, being duly sworn, deposes and says: That he is one of the attorneys for the defendant-appellant herein; that no opinion was rendered by the Appellate Division of the Supreme Court in and for the Second Judicial Department on the affirmance of the judgment and order appealed from.

ELBERT N. OAKES.

Sworn to before me this 23rd day of March, 1915.
E. JOSEPHINE CORWIN,
Notary Public.

72 *Stipulation Waiving Certification.*

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing order of affirmance, judgment of affirmance and notice of appeal to the Court of Appeals are true copies of the originals thereof on file in the office of the Clerk of the County of Orange, and of the whole thereof; and certification thereof by the said Clerk is hereby waived.

Dated, March 25, 1915.

FRANK COMESKY,
Attorney for Respondents.
WATTS, OAKES & BRIGHT,
Attorneys for Appellant.

Court of Appeals Remittitur.

COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 30th day of October in the year of our Lord one thousand nine hundred and seventeen, before the Judges of said Court.

Witness, the Hon. Frank H. Hiscock, Chief Judge, Presiding.
R. M. BARBER, *Clerk.*

73 *Remittitur, October* 31, 1917.

JOHN R. SHUART & ORS., Doing Business, &c., Respondents,

ag'st

ERIE RAILROAD CO., Appellant.

Be it remembered, That on the 5th day of April in the year of our Lord one thousand nine hundred and fifteen, Erie Railroad Company, the appellant in this action, came here into the Court of Appeals, by Watts, Oakes & Bright, its attorneys, and filed in the said court a notice of appeal and return, which return was thereafter amended thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And John R. Shuart & ors., doing business, &c., the respondents in said action, afterward appeared in said Court of Appeals by Frank Comesky, their attorney.

Which said notice of appeal and the return thereto filed and amended as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Elbert N. Oakes, of counsel for the appellant, and by Mr. Frank Comesky, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from in this action, be in all things affirmed. And it was further ordered and adjudged that the respondents recover against the appellant costs of appeal to this court.

And it was also further ordered, that the record aforesaid, and the proceedings in this court be remitted to the said Supreme Court, there to be proceeded upon according to law.

74 Therefore, it is considered that the said judgment be in all things affirmed with costs as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the notice of appeal and return thereto amended as aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals, remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

Albany, Oct. 31, 1917.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

75 *Order Making Judgment of Court of Appeals the Judgment of the Supreme Court of New York.*

At a Special Term of the Supreme Court, held in and for the County of Rockland, at the Supreme Court Chambers, in the Village of Nyack, on the 7th day of November, 1917.

Present: Hon. Arthur S. Tompkins, Justice.

JOHN R. SHUART and Others, Plaintiffs-Respondents,

vs.

ERIE RAILROAD COMPANY, Defendant-Appellant.

This case having been brought on upon the remittitur herein sent down from the Court of Appeals, and now filed in this court by

which remittitur it appears that an appeal was taken by the defendant from the judgment of this Court to said Court of Appeals, and that such appeal has been affirmed with costs and that the record and proceedings had been directed by said Court of Appeals to be remitted to this court, and this Court directed to enforce the said judgment of the Court of Appeals, according to law; now, on motion of Frank Comesky, attorney for the plaintiffs, it is

Ordered and adjudged that the judgment of the said Court of Appeals be and the same is hereby made the judgment of this court; and that the plaintiffs have execution against the defendants for the costs when adjusted by the Clerk and inserted in this judgment as well as for the amount adjudged to be recovered in and by the judgment of this Court in this action entered herein in the office
76 of the Clerk of the County of Rockland on the 15th day of December, 1914, and that this order be annexed to the judgment roll.

A. S. T., *J. S. C.*

Judgment of the Supreme Court of New York.

SUPREME COURT,
Rockland County:

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

VS.

ERIE RAILROAD COMPANY, Defendant.

A judgment in this action in favor of the plaintiffs and against the defendant having been rendered in this court on the 12th day of December, 1913, upon the verdict of a jury for damages and costs in the sum of $476.07, and the defendant having appealed from said judgment to the Appellate Division of this Court and the said judgment having been affirmed by the said Appellate Division and the judgment of affirmance having been rendered thereon, on the 15th day of December, 1914, that the plaintiffs recover against
77 the defendant the sum of $96.37, their costs upon appeal of said Appellate Division, and the defendant having appealed thereupon to the Court of Appeals and the said Court of Appeals having sent hither its remittitur filed herein on the 7th day of November, 1917, by which it appears that the said Court of Appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law, and this Court having by an order entered herein on the 7th day of November, 1917, ordered that said judgment be made the judgment of this Court, with costs, and the same having been adjusted at the sum of $111.47 as per bill of costs filed with the Clerk of this Court; now, on motion of Frank Comesky, attorney for the plaintiffs, it is

Adjudged that the judgment of the said Court of Appeals be and the same is hereby made the judgment of this Court, and that plaintiffs have judgment against the defendant for the sum of $111.47, their costs herein upon appeal as adjusted and that they have execution therefor, as well as for the amount adjudged to be recovered in and by the judgment of this Court, entered herein on the 15th day of December, 1914, and that this judgment be annexed to the judgment roll.

J. W. SHERWOOD, *Clerk.*

78 *Affidavit of No Opinion by Court of Appeals.*

COURT OF APPEALS,
State of New York:

JOHN R. SHUART, LEO SHUART, and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs-Respondents,

against

ERIE RAILROAD COMPANY, Defendant-Appellant.

STATE OF NEW YORK,
County of Orange, ss:

Thomas Watts, being duly sworn, deposes and says that he is one of the attorneys for the defendant-appellant herein; that no opinion was rendered by the Court of Appeals of the State of New York on the affirmance of the judgment and order appealed from.

THOMAS WATTS.

Sworn to before me this 11 day of January, 1918.

E. JOSEPHINE CORWIN,
Notary Public.

79 *Clerk's Certificate.*

STATE OF NEW YORK,
Rockland County Clerk's Office, ss:

I, Jonathan W. Sherwood, Clerk of the County of Rockland and one of the Clerks of the Supreme Court of the State of New York, do hereby certify that I have compared the foregoing notice of appeal from judgment and order to the Appellate Division, Second Department; judgment roll; case and exceptions; order of affirmance by Appellate Division, Second Department; judgment of affirmance by Appellate Division; notice of appeal to Court of Appeals; affidavit of no opinion, Appellate Division; remittitur from the Court of Appeals; order making judgment of Court of Appeals the judgment of the Supreme Court of New York; and judgment of the Supreme

Court of New York, with the originals thereof on file in my office, and that the same are true and correct transcripts thereof and of the whole of said originals.

Witness, my hand and seal of the County of Rockland, this 17th day of January, 1918.

[Rockland County Seal.]

J. W. SHERWOOD, *Clerk*,
By CYRUS M. CRUM,
Deputy Co. Clerk.

80 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Being informed that there is now pending before you a suit in which John R. Shuart, Leo Shuart and John Shuart, Jr., doing business under the name of John R. Shuart & Sons, are plaintiffs, and Erie Railroad Company is defendant, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States,

81 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the sixteenth day of March, in the year of our Lord one thousand nine hundred and eighteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

82 [Endorsed:] File No. 26298. Supreme Court of the United States, No. 831, October Term, 1917. Erie Railroad Company vs. John R. Shuart et al., etc. Writ of Certiorari.

83 STATE OF NEW YORK,
Rockland County Clerk's Office, ss:

I, Jonathan W. Sherwood, Clerk of the County of Rockland and one of the Clerks of the Supreme Court of the State of New York, do hereby certify that the transcript of the record of the proceedings of this court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the first day of April, A. D. 1918, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

New York Supreme Court, Rockland County.

JOHN R. SHUART, LEO SHUART and JOHN SHUART, JR., Doing Business under the Name of John R. Shuart & Sons, Plaintiffs,

against

ERIE RAILROAD COMPANY, Defendant.

It is hereby stipulated that the transcript already filed, in the clerk's office of the Supreme Court of the United States with the petition for the writ of certiorari, be taken as a return to said
84 writ, dated the 16th day of March, 1918.

Dated March 23, 1918.

FRANK COMESKY,
Counsel for John R. Shuart, Leo Shuart and John Shuart, Jr., Doing Business under the Name of John R. Shuart & Sons.

WATTS, OAKES & BRIGHT,
THOMAS WATTS,
Counsel for Erie Railroad Company.

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness, my hand and seal of the County of Rockland, this first day of April, A. D. 1918.

[Rockland County Seal.]

J. W. SHERWOOD, *Clerk.*

85 [Endorsed:] New York Supreme Court. Rockland County. John R. Shuart, Leo Shuart and John Shuart, Jr., Doing Business under the Name of John R. Shuart & Sons, v. Erie Railroad Company. Return to Writ of Certiorari.

86 [Endorsed:] File No. 26298. Supreme Court U. S. October term, 1917. Term No. 831. Erie Railroad Company, Petitioner, vs. John R. Shuart et al., etc. Writ of Certiorari and Return. Filed April 5, 1918.

FILED
JAN 26 1918
D. MAHER,
CLERK.

No. 8[redacted]342

Supreme Court of the United States

ERIE RAILROAD COMPANY,

Petitioner,

against

JOHN R. SHUART, LEO SHUART and JOHN R. SHUART, Jr., doing business under the name of JOHN R. SHUART & SONS,

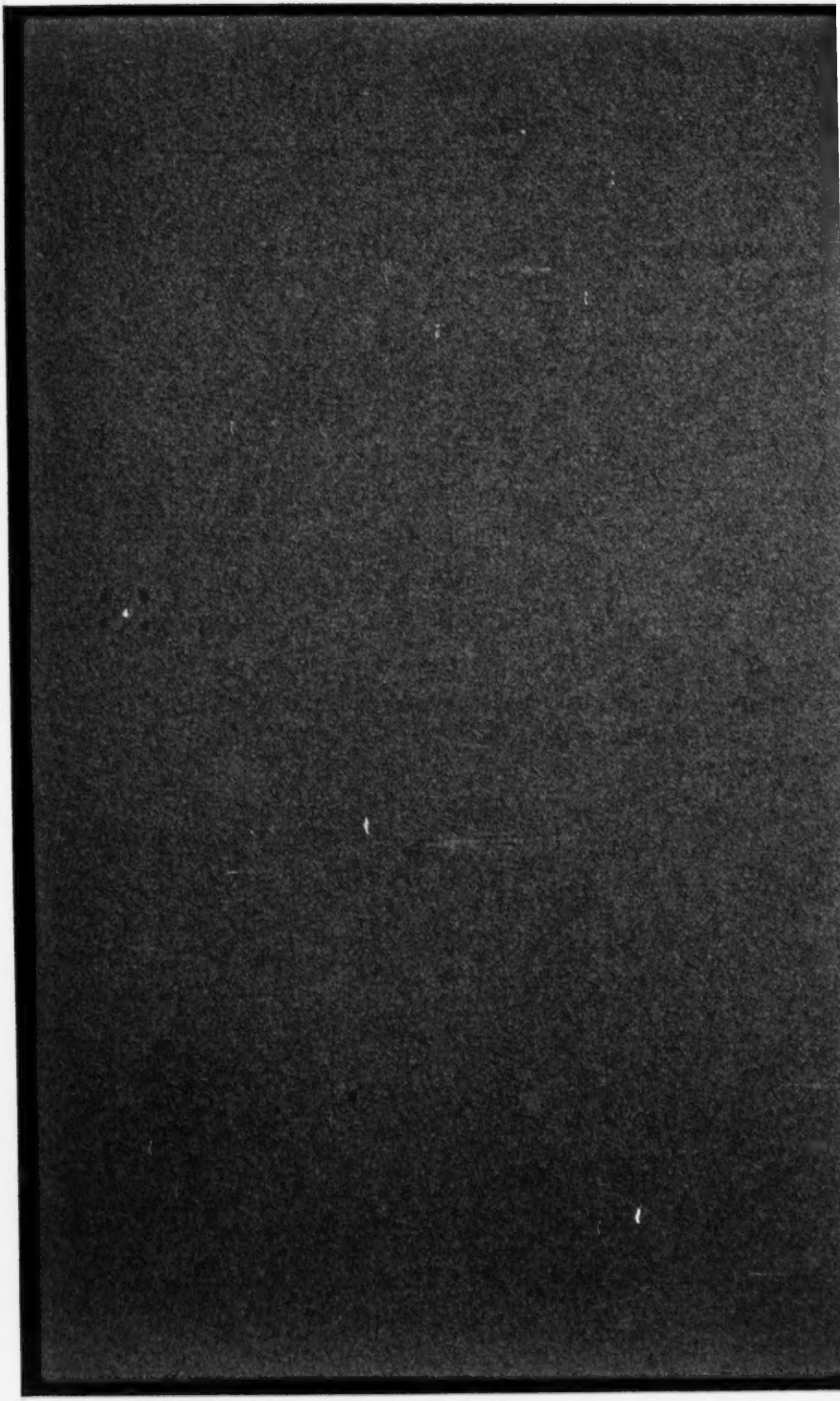
Respondents.

Petition for Writ of Certiorari to the Supreme Court for Rockland County, New York State, and Brief of Petitioner.

THOMAS WATTS,
ELBERT N. OAKES,
JOHN BRIGHT,
Attorneys for Petitioner.

THOMAS WATTS,
Of Counsel.

THE REPORTER CO., WALTON, N. Y.
New York Office: 120 Broadway, Room 511. Phone 3[illegible] Rector.
Brooklyn Office: 26 Fulton Street, Room 31. Phone 3[illegible] Main.
1918



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Supreme Court of the United States

ERIE RAILROAD COMPANY,
Petitioner,
against
JOHN R. SHUART, LEO SHUART and JOHN R. SHUART, JR., doing business under the name of John R. Shuart & Sons,
Respondents.

TO THE HONORABLES, THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Erie Railroad Company, respectfully shows:

1. Respondents commenced action against petitioner herein in the Supreme Court of the State of New York, Rockland County, claiming damages for injury to five of a carload of twenty-two horses shipped by them upon a through bill of lading, or uniform live stock contract from East St. Louis, Illinois, to Suffern, New York. The respondents' claim throughout has been that the injury to these five horses was occasioned by the carrier's negligence in permitting another car to come forcibly against the car containing the horses and that this occurred immediately after the car containing the horses had been placed at the

cattle chute at Suffern for unloading, and before any of the horses had been removed from the car (fols. 13, 14, 61-66, 114-117, 122, 123, 127).

2. The answer of petitioner set up the defense that respondents were not entitled to recover because of their failure to comply with one of the provisions of the uniform live stock contract by giving to petitioner a verified notice in writing of respondents' claim for damage within five days from the time of the removal of the horses from the car (fols. 20-23).

3. In the trial of the action before the Court and a jury the uniform live stock contract was received in evidence upon the admission by respondents of the due execution thereof; and respondents also admitted upon the trial that they never made out or delivered any verified claim or other writing to petitioner of their claim for all or any part of the damage sued for (fols. 96, 161, 170, 171, 109, 126).

4. A duly certified copy of the tariffs on file with the Interstate Commerce Commission, and in force at the time of the shipment, were received in evidence and included therein is the uniform live stock contract under which this shipment was carried (fols. 130, 187). Said tariffs and a certified copy of the record herein are submitted as part of this petition.

5. Your petitioner at the close of the testimony moved for a dismissal of the complaint and also for a direction of a verdict in its favor upon the ground, among others, of the admitted failure of respondents to make or deliver to petitioner a notice in writing of their claim for damage. Both motions were denied and petitioner excepted (fols. 129-132).

6. The Trial Court refused to recognize the validity or applicability of the uniform live stock contract;

notwithstanding it constituted one of the filed tariffs in effect at the time the damage was sustained, the Court in its charge to the jury holding as a matter of law that the provisions of this contract applied only during actual, physical transportation; that, if the injury to the horses occurred before any of the horses were removed from the car, but yet after the arrival of the car at the cattle chute at Suffern, respondents' failure to give verified notice in writing of their claim for damage did not constitute any bar to their recovery because "the actual transportation had ended" and, therefore, the terms of the contract were no longer of any force. To this construction and charge your petitioner duly excepted (fols. 145-147, 158, 159).

7. The jury by the verdict necessarily found the injury to the horses occurred before any of the horses were removed from the car and after its arrival at the cattle chute at Suffern (fols. 145-147). And upon the verdict of the jury in favor of respondents judgment was entered against your petitioner. On appeal to the Appellate Division of the Supreme Court of New York the judgment against your petitioner was affirmed without opinion (fols. 40, 199, 205).

8. From the judgment entered in the office of the Clerk of the Supreme Court of the State of New York, Rockland County, upon the order of the Appellate Division, unanimously affirming the judgment of the Trial Court, petitioner appealed to the Court of Appeals of the State of New York, which is the highest court of the State in which a decision could be had, and on November 7, 1917, the Court of Appeals unanimously affirmed without opinion the judgment appealed from. The Court of Appeals remitted the case to the Supreme Court of the State of New York by transferring the remittitur to the Clerk of

the Supreme Court, Rockland County, and said Supreme Court on November 8, 1917, entered judgment upon said remittitur in favor of respondents and against petitioner (fols. 208, 217).

9. The question involved is whether or not the Trial Court's construction of the uniform live stock contract and his charge to the jury based thereon, namely, that the contract had no force or applicability because the transportation at the time of the injury to the horses had ended, is erroneous and in conflict with an Act of Congress of the United States (Subdivision 2, § 8563 of the U. S. Compiled Statutes, Vol. 8).

10. The question here presented by your petitioner was duly urged in the Trial Court and exceptions taken and was duly presented and urged in both the Appellate Division of the Supreme Court and the Court of Appeals of New York.

11. Your petitioner avers that the present case is one in which it is proper for this Court to issue a writ of certiorari for the following reasons:

First. Because the Trial Court erred in refusing to permit any force or effect to be given to the uniform live stock contract.

Second. Because the Trial Court erred in instructing the jury that the transportation at the time of the injury to the horses at the cattle chute was ended and the terms of the uniform live stock contract, therefore, of no force or effect.

Third. Because the instruction of the Trial Court that the transportation was ended when the car containing the horses was placed at the cattle chute is in direct conflict with the terms of an Act of Congress, which defines transportation in such terms as to have required the Trial Court to have held that the trans-

portation of the horses continued while they remained in the car at the cattle chute, and, therefore, that the terms of the contract were applicable and controlling at the time the damage occurred.

Fourth. Because the Appellate Division of the Supreme Court and the Court of Appeals of New York by their respective affirmance of respondents' judgment has each rendered decision in conflict with said Act of Congress.

Fifth. Because to permit a shipper upon any theory to evade the terms of a contract selected by him and being one of those on file with the Interstate Commerce Commission, and particularly to permit a shipper to evade the effect of the terms of such contract upon a theory in direct conflict with a statute passed by Congress, would result in this case, and others to follow, in preferences and discriminations in violation of law.

Sixth. Because a decision on this question by this Court is of great importance to shippers and common carriers generally, and your petitioner is informed and believes that other cases involving the same question are now pending in the courts of the several states against various common carriers by railroad.

Seventh. Because, under the circumstances heretofore stated, a full consideration of the case by this Court will tend to prevent costly and undesirable litigation and promote justice to all interested.

Eighth. Because by the final judgment which has been rendered against your petitioner upon the order of the Court of Appeals there is drawn in question a right, title, privilege, or immunity claimed under the Constitution, or a treaty or statute of, or commission held or authority exercised under the United States,

and the decision is against the right, title, privilege, or immunity especially set up and claimed by your petitioner under such Constitution, treaty, statute, commission, or authority.

Wherefore, petitioner prays that this Honorable Court will grant its writ of certiorari directed to the Supreme Court of the State of New York, in and for Rockland County, requiring that the record of said cause in said Court and its judgment be certified to this Court, and that this Honorable Court will thereupon proceed to correct the errors complained of, reverse the said judgment and remand the said cause, and give to your petitioner such other and further relief as the nature of the case may require and to the Court may seem proper in the premises.

ERIE RAILROAD COMPANY,
By David Bosman,
Its Secretary.

Thomas Watts,
Elbert N. Oakes,
John Bright,
Attorneys for Petitioner.

State of New York,
County of New York, } ss:

David Bosman, being duly sworn, says that he is the secretary of the Erie Railroad Company, the petitioner herein; that he has read the foregoing petition and the same is true of his own knowledge except as to the matters therein alleged to be upon information and belief and as to those matters he believes it to be true.

DAVID BOSMAN.

Sworn to before me this
8 day of January, 1918.
A. L. Travis,
Notary Public, No. 106,
Kings County.
Certificate filed in New York County, No. 61.
My commission expires March 30, 1919.
N. Y. County Register's Office, No. 9069.
(L. S.)

I hereby certify that I have examined the foregoing petition and that in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Court.

THOMAS WATTS,
Of Counsel for Petitioner.

Memorandum in Behalf of Petitioner in Support of Application for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES.

ERIE RAILROAD COMPANY,
Petitioner,
against
JOHN R. SHUART, LEO SHUART and JOHN R. SHUART, JR., doing business under the name of John R. Shuart & Sons,
Respondents.

Statement.

Respondents shipped twenty-two horses in a stock car from East St. Louis, Ill., to Suffern, N. Y. (fols. 51, 52, 59). The car came through from the origin to the destination of the shipment upon a single bill of lading or uniform live stock contract, so that it constituted but one shipment and was of an interstate commerce character (fols. 152, 95, 96).

Upon the arrival of the car at Suffern it was placed in position by the employees of petitioner (fols. 59, 62, 105). Respondents were then on hand and proceeded to prepare the car for unloading; they opened the car door, put down the bridge that connected the car with the chute, and proceeded with their work preparatory to taking the horses out of the car (fols. 62, 63, 64). Before any of the horses were removed from the car it was accidently moved by petitioner resulting in injury to five of the horses, and

it was to recover damages for such injury that this action was brought (fols. 65, 116).

Respondents admitted the execution of the uniform live stock contract, and by the terms of that contract it is acknowledged that the option existed of shipping the horses at a higher rate of freight according to the official tariffs of the initial and connecting carrier, or of shipping them under this live stock contract at a reduced rate of freight (fols. 165, 174, 175).

By the terms of the live stock contract it is provided that no claim for damage which may accrue to the shipper shall be allowed or paid by the carrier or sued for in any court, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the shipper or his agent, and delivered within five days from the time that the stock is removed from the car to some proper officer or agent of the carrier (fols. 170, 171).

Respondents admit that they never made out or delivered any paper or claim with respect to the damage to any of these horses (fols. 109, 126).

A certified copy of the tariffs of the carriers involved was received in evidence and contained therein as one of the tariffs is the form of the uniform live stock contract which was executed by respondents and the carrier (fols. pp. I, III, VI, 29, 30).

The question involved is, therefore, whether or not respondents were entitled to recover because of their failure to present to petitioner written claim of damage within five days from the time the stock was removed from the car.

At the close of all the testimony the counsel for petitioner duly made a motion before the Trial Court for a dismissal of the complaint, and one of the grounds of that motion was that:

> "No verified claim with respect to the damage sustained by the plaintiffs was ever filed

> by any of the plaintiffs with defendant within the period of five days from the time that this damage occurred as provided by this live stock contract signed by the plaintiffs. Motion denied. Exception by Mr. Oakes" (fols. 130-132).

Immediately following the denial of the motion for a dismissal of the complaint the following motion was also made in behalf of petitioner (fol. 132):

> "Mr. Oakes: And upon the same grounds we ask the Court to direct a verdict for the defendant.
>
> "Motion denied. Exception by Mr. Oakes."

The same question was raised by petitioner by excepting to the charge of the Court, as appears more fully in the following point.

Petitioner's Exhibit E, filed herewith, contains a duly certified copy of the tariffs of the initial carrier and your petitioner as the connecting carrier at pages I, III, VI, 29 and 30.

POINT I.

The State Courts erred in refusing to allow any force or effect to be given to the uniform live stock contract, such refusal being based upon the erroneous theory that at the time of the injury to the horses the transportation thereof had ended, and such theory being in conflict with one of the statutes of the United States.

The Trial Court, in its charge to the jury, recognized generally the validity of the live stock contract and the provision which required a notice in writing from respondents of their claim for damage within five days following the removal of the horses from the car, but the Trial Court construed this five-day notice provision, as well as the other provisions of the contract, as applying only during actual transportation and that as a matter of law the transportation had ceased at the time this accident occurred, petitioner excepting (fols. 145-147, 151, 158, 159).

The parts of the charge referred to are as follows:

> "If the horses were injured before the car reached Suffern, from any cause, no matter what, the plaintiffs cannot recover in this action, because under this contract, which Mr. Shuart signed, he agreed that for any damage that might be done to the horses while they were actually being transported he would make a written and verified claim and serve it upon some official of the railroad company within five days, and it is admitted that no such claim was made, no verified statement was ever pre-

sented to any officer of the railroad company, and besides that, the shipping contract places a limit upon the liability of the railroad company, limiting the plaintiffs' right of recovery to not more than $100 for any horse, no matter how valuable it may have been, or how much damage was done. For the reason that no verified claim was filed with the railroad company, the plaintiffs cannot recover for any injury that might have been done to the horses while they were being actually transported, and the plaintiffs cannot recover in this suit unless some damage was done to these horses by reason of that collision that occurred after the actual transportation was over, and the car had been placed there alongside of the cattle chute to enable the plaintiffs, whose duty it was under this contract, to remove the horses from the car (fols. 145-147). * * *

"The Court: I said that under the contract it was the plaintiffs' duty to unload them.

"Mr. Bright: Does that provision of the contract apply to this unloading at the time of the collision?

"The Court: I so hold, yes. The actual transportation had ended, and the only thing that remained to be done, under the contract, was the work that the plaintiffs had to do. The defendant's work was over (fol. 158). * * *

"Mr. Bright: I also except to your Honor's construction of the live stock contract relating to the five days' notice provision" (fol. 159).

The jury necessarily found that the horses were injured in the accident which occurred after the car had been placed at the cattle chute and before any of the horses were removed therefrom, because under the charge of the Trial Court the jury was required to find such to be the fact, if it found a verdict at all in favor of respondents.

Subdivision 2 of Section 8563 of the United States

Compiled Statutes, Vol. 8, defines the term "transportation" as follows:

> "and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

Under this statute the provisions of the live stock contract were as much in force at the time of the accident in question as they had been at any time during the movement of the car over defendant's main tracks. It will be observed that the statute says that the term "transportation" shall *include cars* and all *instrumentalities* and *facilities of shipment or carriage* irrespective of ownership. Petitioner's car was in use by respondents as shippers at the time this accident occurred, to the extent that the horses were still occupying it, and so long as respondents continued to use the car, even to the extent of mere occupation, the "transportation" continued, and, of course, so long as the "transportation" continued the contract in its entirety must be considered as still applicable.

The cattle chute which adjoined this car at the time of the accident was an instrumentality or facility of shipment as contemplated by the statute. It does not appear who owned the cattle chute, but that was a matter of no consequence because the statute prescribes "irrespective of ownership." Therefore, if at the time of the accident it be assumed for the pur-

pose of argument that the horses had actually left the car and were passing down the cattle chute into the pen, still within the contemplation of the statute the "transportation" would still be in progress.

Furthermore, the specific provision of the statute that "the terms transportation shall include * * * all services in connection with the * * * delivery * * * of property transported" is in direct conflict with the construction adopted by the Trial Court. The occupation of the car by the horses at the time of this accident constituted a use of the petitioner's property by respondents, and such use was part of the service rendered by the petitioner in connection with the *delivery* of these horses. And the intended and necessary use of the cattle chute by the horses was a service still to be rendered in connection with the *delivery* of the property transported.

Thus, it is perfectly apparent that the transportation continued to and existed at the very moment when this accident occurred, and the same effect must be given to the contract as if the injury to the horses occurred while they were actually enroute to the place of their destination.

This Court, in the case of *Cleveland & St. Louis Ry v. Dettlebach,* 239 U. S. 588, had occasion to consider whether the terms of a bill of lading under which goods had been shipped were still applicable after the actual movement of the goods had ceased and while they were still in the railway company's possession as warehouseman. This Court, in its opinion in that case, said in part as follows:

> "It is no longer open to question that if the loss had occurred in the course of transportation upon defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing the lower of two rates of freight, would have been binding upon plaintiff, in view of the Carmack

Amendment. *Adams Express Co. v. Croninger*, 226 U. S. 491, 509; *Kansas Southern Ry. v. Carl*, 227 U. S., 639, 648, 654; *Mo., Kans. & Tex. Ry. v. Harriman*, 227 U. S. 657, 668. The question is, whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control also, during the ensuing relation of warehouseman. * * *

"We recognize the cogency of the reasoning from the standpoint of the common law responsibility of a railway company as carrier and as a warehouseman. But we have to deal with the effect of an express contract made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo., Kans. & Tex. Ry. v. Harriman*, 227 U. S. 657, 672; *Atchison, etc., Ry. v. Robinson*, 233 U. S. 173, 180. * * *

"And this (provision of the bill of lading) is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584 c. 3591), which enlarged the definition of the term 'transportation' (this, under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof *and all services in connection* with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and hauling *of property transported*'; etc., * * *

"From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the com-

> mon law, were separable from the carrier's service as carrier, etc., * * *
>
> "We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman."

This Court, in the case of *Southern Ry. v. Prescott,* 240 U. S. 632, had occasion again to consider a situation where the facts are somewhat similar. In that case action was brought to recover damages for the loss of nine boxes of shoes which were destroyed by fire while in the freight house of the railway company. The entire shipment consisted of thirteen boxes of shoes, but the consignee had procured from the agent of the railway company four of the boxes of shoes and had asked permission that the rest be permitted to remain to await the consignee's convenience in removal. The Trial Court in that case submitted to the jury the question of liability under the state law, while the carrier contended that the shipment had not lost its interstate character, and that in spite of the fact that it had been lodged in the freight house following actual transportation, the provisions of the bill of lading were still controlling. This Court, in its decision, held that the obligation of the railway company was not governed by the state law and that the provisions of the bill of lading applied.

The terms of the contract, signed by respondents, contain their acknowledgment that they had the option of shipping this live stock at a higher rate of freight, according to the official tariffs, and that they voluntarily decided to ship the same under the contract at the reduced rate of freight (fols. 95, 96, 174). Such admission constitutes *prima facie* evidence of choice by respondents and raised the presumption that the tariff schedules were duly filed in compliance with the

Acts of Congress. *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, 327, 328.

The requirement of the contract that verified notice in writing of respondents' claim to be given to petitioner within five days from the time the stock is removed from the car and that the giving of such notice is a condition precedent to the maintenance of an action is a reasonable and valid provision.

Chesapeake & Ohio Ry. Co. v. McLaughlin, 242 U. S. 142.
Clegg v. St. Louis & S. R. R. Co., 203 Fed. 971, 973.
Lewis v. Great Western R. Co., 5 H. & N. 867.
Black v. Wabash, etc., R. Co., Illinois 351.
Dawson v. St. Louis R. Co., 76 Mo. 514.
Pavitt v. Lehigh, etc., R. Co., 153 Pa. St. 302.
Anderson v. Lake Shore, etc., R. Co., 26 Ind. App. 196.

Respondents are conclusively presumed to know the contents of the contract.

Cau v. Texas & Pac. Ry. Co., 194 U. S. 427, 431.
Kansas Southern Ry. v. Carl, 227 U. S. 639, 653.
J. H. Hamlen & Sons Co. v. Illinois Cent. R. Co., 212 Fed. 324, 328.
Moore v. Duncan, 237 Fed. 782.
Western Transit Co. v. Leslie & Co. 242 U. S. 448, 454.

Respectfully submitted,

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JOHN BRIGHT,
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No. 8[redacted]42

Supreme Court of the United States

ERIE RAILROAD COMPANY,

Petitioner,

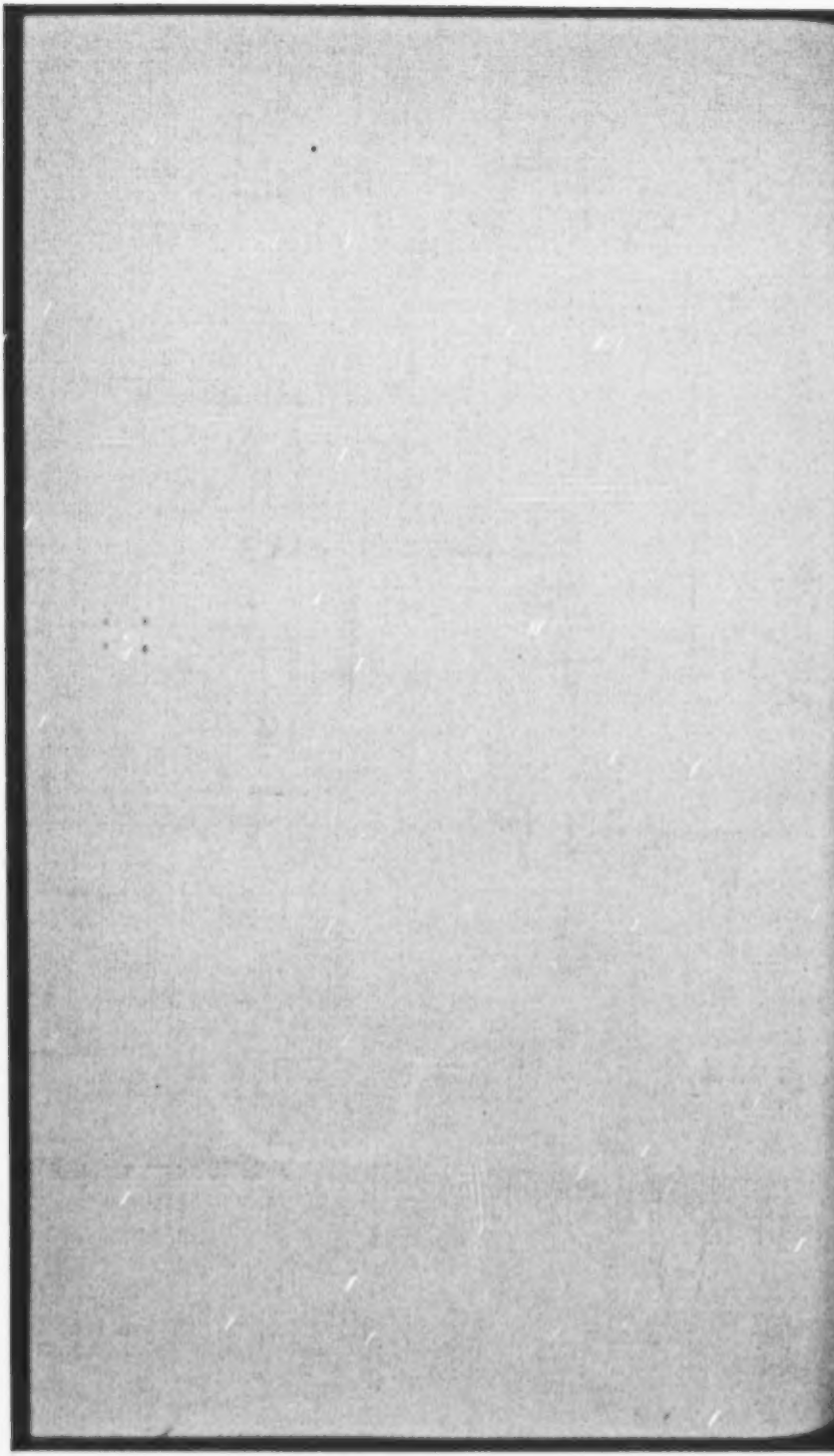
against

JOHN R. SHUART, LEO SHUART and JOHN R. SHUART, JR., doing business under the name of JOHN R. SHUART, & SONS, *Respondents.*

Brief for Respondents in Opposition to Application for Writ of Certiorari.

FRANK COMESKY,
Attorney for Respondents,

REEVES T. STRICKLAND,
Of Counsel.



SUPREME COURT OF THE UNITED STATES

ERIE RAILROAD COMPANY,
Petitioner,

against

JOHN R. SHUART, LEO SHUART AND JOHN R. SHUART, JR., DOING BUSINESS UNDER THE NAME OF JOHN R. SHUART AND SONS,
Respondents.

Brief for Respondent in Opposition to Application for Writ Certiorari.

Statement

The Respondents shipped twenty-two horses from East St. Louis to Suffern, New York, over the petitioner's road and in one of petitioner's cars (fols. 52 & 184-6). The horses arrived at Suffern about 2:30 A. M., April 9, 1912 (fol. 68). The respondents were on hand to receive the horses (fol. 59). The train conductor and one of the respondents stood in the cattle chute while the car was placed before it (fol. 59), and the brakes set upon the car and the engine disconnected, (fol. 62). The conductor then advised respondents to get the horses out as quickly as possible; he saw them open the car door and put down the bridge and do the work preliminary to taking the horses from the car, (fols. 63 and 113). The engine that had placed the car, moved out of the switch to the west and passing the horse car on an adjoining track (fol. 114) entered this switch again on it's easterly end, and while doing some switching there backed a train of freight cars down against the horse car with such force as to move the car

some three feet (fol. 115), and caused the injuries to the horses therein, of which respondents complain.

At the moment of the accident, the respondents, John R. Shuart and the son Leo, stood upon the bridge connecting the cattle-chute with the car, each having hold of two horses which they were about to lead from the car (fols. 65 and 114). The freight on this shipment had been paid by the respondent before the arrival of the car at Suffern (fol. 107).

Respondents by their complaint alleged (fols. 13 and 14) that the horses had been delivered to them and that the petitioner's control, supervision and interests in the carload of horses had ceased.

The livestock contract offered in evidence by the petitioner provided that the respondents were required to unload the horses (fol. 167), and petitioner's answer contains an allegation to the same effect (fol. 25).

The case was tried by respondents upon the theory that the transportation contract between respondents and petitioner had terminated; that the freight had been paid by respondents to petitioner; that petitioner had delivered the horses to the respondents in whose possession they were at the time of the injury. The petitioner denied that its negligence caused the accident and alleged that if there was any liability on the part of the petitioner the same was measured by the live stock contract.

It was admitted upon the trial by respondents that no claim had been made by them under the

live stock contract.

POINT I

Of the Live Stock Contract.

The Court's construction of the live stock contract is correct; it has no application to this case.

That the live stock contract is controlling while goods shipped in interstate commerce are in transit or are held by the carrier as a warehouseman is not denied. That is the holding of the two cases cited by petitioner. *Cleveland and St. Louis Ry. vs. Settleback, 239 U. S. 588 and Southern Ry. vs. Prescott, 240 U. S. 632.*

In the first of the above cases the Court held that where goods had been shipped in interstate commerce and held by the carrier at the point of destination as a warehouseman, the shipping contract measured the carrier's liability for damages to the goods while so held. Among other things the Court said:

> "From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "*transportation,*" and subjected to the provisions of the act respecting reasonable rates and the like."

In the second case above referred to, the Court held that a bill of lading measured the liability of a carrier in interstate commerce where the goods remained in the possession of the carrier as a warehouseman at the point of their destination. The Court said:

> "The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express *condition governing the company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival.* Such a retention of the goods was undoubtedly a terminal service forming a part of the "transportation" in the sense of the Federal Act and governed by that act."

Again the Court said:

> "The actual service in holding the goods continued, and we must look to the bill of lading to determine the legal obligation attaching to that service."

The learned Justice who delivered the opinion, had previously been careful to say, *"It is apparent that there had been no actual delivery of the nine boxs."*

It will therefore be seen that neither of the cases cited by Appellant is authority for the claim that the live stock contract measures defendant's liability. In both cases the goods were in the carrier's possession as warehouseman, while in the case at bar the horses were in the possession of the consignees, these respondents. In the cases cited the carrier still had some service to perform; in the cases at bar it had none.

While a carrier may be liable as a warehouse-

man after a constructive delivery of goods (Tarbel vs. Exchange Shipping Co. 110 N. Y. 170), no one would claim that a carrier was liable either as carrier or warehouseman after an actual delivery of goods. When actual delivery is made, the relation of carrier or warehouseman as the case may be, must cease. When goods pass out of a carrier's possession and from under its control and into the possession of the consignee the obligations of the carrier are at an end.

Goodwin v. B. & O. R. R. Co., 50 N. Y., 154;
Tarbell v. Royal Exchange Shipping Co., 110 N. Y., 170.

POINT II

Of the Delivery of the Horse.

Respondents alleged delivery in their complaint as follows (fol. 14):

> "Said carload of horses was by defendant delivered to plaintiffs, and all control supervision and interest in said carload of horses by defendant thereupon ceased and terminated and plaintiffs accepted such delivery and thereupon took possession of the same."

Respondents established delivery by proof, as follows:

(a) Respondents were at the point of destination to receive the horses when they arrived (fol. 59).

(b) The train conductor and one of the respondents stood in the cattle-chute while the car was being placed in front of it and the respondents gave the conductor directions as to how it should be placed (fols. 61 and 113).

(c) When the car was in the right position one of the respondents said to the conductor, "That

is good." Thereupon the brakes were set on the car, the engine was disconnected and it was moved away (fol. 62).

(d) The conductor then said to the respondents, "You had better get them (the horses) out as soon as you can, they have been on the road a good while and must be tired and hungry."

(e) Respondents opened the car door in the presence of the conductor (fol. 63) and proceeded with the work preliminary to taking the horses out of the car.

(f) At the time of the accident the bridge was in place connecting the car with the chute and two of the respondents stood upon it each holding two horses by their halters, in the very act of leading them from the car (fol. 65).

(g) The freight had been paid to the agent before the car arrived (fol. 107).

(h) It was respondents' duty to unload the horses (fols. 25 and 167).

From the foregoing it will be seen that respondents alleged and proved actual delivery of the horses to them before the accident; therefore the livestock contract was at an end. It no longer defined the relations of the parties or measured their rights and obligations toward each other.

The Court in submitting the case to the jury said (fol. 159).

> "The actual transportation had ended; and the only thing that remained to be done, under the contract, was the work that the plaintiffs had to do. The defendant's work was over."

The question of the extent to which a drover's pass shields a railroad company from liability for negligence was before the Court

of Appeal in Stinson v. N. Y. C. & H. R. R. Co., 32 N. Y., 333. There it was held that the drover's pass did not apply although the pass was in the pocket of the plaintiff's intestate at the time of his death, for the reason that the journey under which it was to become operative had not commenced. Here the livestock contract does not apply, because the journey under which it had operated was at an end and the property covered by it had been delivered to respondents.

The petitioner has had a fair trial, two careful reviews, one by the Appellate Division and one by the Court of Appeals, the record is free from prejudicial error and therefore its petition should be denied.

FRANK COMESKY,

Attorney for Respondents.

REEVES T. STRICKLAND
of Counsel.

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No. 342

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

ERIE RAILROAD COMPANY,

Petitioner,

against

JOHN R. SHUART, LEO SHUART and JOHN R. SHUART, Jr., doing business under the name of JOHN R. SHUART & SONS,

Respondents.

BRIEF FOR PETITIONER.

THOMAS WATTS,
Of Counsel for Petitioner.

THE REPORTER CO., WALTON, N. Y.

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Supreme Court of the United States

ERIE RAILROAD COMPANY,
Petitioner,
against
JOHN R. SHUART, LEO SHUART and JOHN R. SHUART, JR., doing business under the name of John R. Shuart & Sons,
Respondents.

BRIEF FOR PETTTIONER.

This case comes to this court by writ of certiorari for review of a judgment of the Supreme Court of New York, Rockland County, entered upon an affirmance by the New York Court of Appeals of a judgment in favor of respondents and against petitioner (fols. 73-78, 80).

The affirmance by the Court of Appeals and by the Appellate Division of the Supreme Court was in each instance without opinion (221 N. Y. 680; 166 App. Div. 895).

Statement of the Case.

Respondent shipped twenty-two horses in a stock car from East St. Louis, Illinois, to Suffern, New York (fols. 17, 18, 32, 54, 55). Upon the arrival of the car

at Suffren five of the horses were injured and this action was brought to recover damages therefor (fols. 10, 50). The car came through upon a single bill of lading or uniform live stock contract, so that it constituted a through shipment of an interstate commerce character (fols. 54, 55).

Upon the arrival of the car at Suffern the railroad employees placed it in position at a cattle chute (fols. 20, 21). Respondents were then on hand and proceeded to prepare the car for unloading; they opened the car door; put down the bridge that connected the car with the chute; and proceeded with their work preparatory to taking the horses out of the car (fols. 21, 22). Before any of the horses were removed from the car, it was accidentally moved by the employees of the carrier, resulting in injury to five of the horses, and it was to recover damages for such injury that this action was brought (fol. 22).

Respondents admitted the execution of the uniform live stock contract, and by the terms of that contract it is acknowledged that the option existed of shipping the horses at a higher rate of freight according to the official tariffs of the initial and connecting carrier or of shipping them under this live stock contract at a reduced rate of freight (fols. 32, 55).

By the terms of the live stock contract it is provided that no claim for damage which may accrue to the shipper shall be allowed or paid by the carrier or sued for in any court unless a claim for such loss or damage shall be made in writing verified by the affidavit of the shipper or his agent and delivered within five days from the time the stock is removed from the car to some proper officer or agent of the carrier (fol. 57).

Respondents admit that they never made out or delivered any paper or claim with respect to the damage to any of these horses (fol. 37).

The question involved is, therefore, whether or not respondents were entitled to recover because of their failure to present to petitioner written claim of damage within five days from the time the stock was removed from the car.

The legal aspect of the question is whether or not the trial court was in error in holding that the notice required of the shipper was unnecessary in this instance, because the transportation at the time of the injury to the horses had ceased. And our contention is that the transportation of these horses had not ceased at the time of injury to them and that the trial court's ruling and construction of this contract was error.

These questions were raised by respondents by excepting to the refusal of the trial court to non-suit at the close of the plaintiffs' case, one of the grounds of that motion being that the plaintiffs were not entitled to recover because of their admitted failure to give written notice to the carrier of their claim for damage; also by excepting to the denial of the same made at the close of the whole testimony (fols. 43, 44); and also by excepting to the charge of the trial court in which the jury were told in substance that no notice was necessary and that the plaintiffs were entitled to recover if the injury to the horses occurred while they were in the car at the cattle chute (fols. 49, 53).

A certified copy of the tariffs of the carriers involved was received in evidence and contained therein as one of the tariffs is the form of the uniform live stock contract which was executed by respondents and the initial carrier (fol. 44).

This certified copy of the official tariff, being Exhibit E, is now on file with this Court, the relevant portions thereof appearing upon pages I, III, VI, 29 and 30.

Specification of Errors.

At the close of respondents' testimony as well as at the close of the whole testimony the counsel for the railroad company made a motion for a non-suit and a dismissal of the complaint, specifying as one of the grounds thereof (fols. 43, 44):

> "that no verified claim with respect to the damages sustained by the plaintiffs was ever filed by any of the plaintiffs with defendant within the period of five days from the time that this damage occurred as provided by this live stock contract signed by the plaintiffs. Motion denied. Exception by Mr. Oakes."

Immediately following the motion for the dismissal of the complaint the counsel for the railroad made a motion for the direction of a verdict in favor of the defendant as follows (fol. 44):

> "Mr. Oakes: And upon the same grounds we ask the Court to direct a verdict for the defendant. Motion denied. Exception by Mr. Oakes."

The charge of the trial court to the jury contained the following instruction (fol. 49):

> "If the horses were injured before the car reached Suffern from any cause, no matter what, the plaintiffs cannot recover in this action, because under this contract, which Mr. Shuart signed, he agreed that for any damage that might be done to the horses while they were actually being transported he would make a written and verified claim and serve it upon some official of the railroad company within five days, and it is admitted that no such claim was made, no verified statement was ever presented to any officer of the railroad company, and besides that, the shipping contract places a limit upon the liability of the railroad company, limiting the plaintiffs' right of recovery to not more than $100 for any horse, no matter how valuable it may have been, or how much

> damage was done. For the reason that no verified claim was filed with the railroad company, the plaintiffs cannot recover for any injury that might have been done to the horses while they were being actually transported, and the plaintiffs cannot recover in this suit unless some damage was done to these horses by reason o hat collision that occurred after the actual t... sportation was over, and the car had been placed there alongside of the cattle chute to enable the plaintiffs, whose duty it was under this contract, to remove the horses from the car."

Following the main charge and before the jury retired the following colloquy between the trial court and the counsel for the railroad occurred (fol. 53):

> "The Court: I said that under the contract it was the plaintiffs' duty to unload them.
>
> "Mr. Bright: Does that provision of the contract apply to this unloading at the time of the collision?
>
> "The Court: I so hold, yes. The actual transportion had ended, and the only thing that remained to be done, under the contract, was the work that the plaintiffs had to do. The defendant's work was over."

The counsel for the railroad company duly excepted to the foregoing charge of the trial court in this language (fol. 53):

> "Mr. Bright: I also except to your Honor's construction of the live stock contract relating to the five days' notice provision etc."

The amended answer of the carrier sets forth as a separate defense the existence of a written contract and the terms thereof with respect to a verified claim for damage within five days from the time of the removal of the stock, and that the respondents herein failed and wholly neglected to make any claim in writing within said five days or within any other period of time (fols. 7, 8).

POINT I.

The case is properly before this Court upon the denial of the petitioner's claim of federal right.

St. Louis I. Mt. & So. Ry. Co. vs. Starbird, as admr., 243 U. S. 592.

POINT II.

The action of the State Courts in refusing to allow any force or effect to be given to that provision of the uniform live stock contract which required of respondents verified notice of their claim for damage was error.

It will be noted by the language of the charge above quoted that the trial court recognized generally the validity of the provision of the live stock contract, which required from respondents a verified claim of their damage within five days from the time of the removal of the horses from the car, because the jury was instructed that no recovery against the railroad could be had if the injury to the horses occurred *before they reached Suffern*. But with respect to any injury produced in the accident which occurred while the car stood at the cattle chute, the trial court denied any force to the clause of the contract in question, giving as a reason therefor that the "actual transportation was over," evidently reasoning that no longer could force be given to the terms of a contract which had been terminated by performance.

The trial court's determination, binding upon the jury, as to the time of the ending of the "transportation" is in direct conflict with an Act of Congress in force at the time of this shipment (Vol. 8, section 8563, subdivision 2 of United States Compiled Statutes) in part being as follows:

> "and the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

Under this statute the provisions of the live stock contract were as much in force at the time of the accident in question as they had been at any time during the movement of the car over defendant's main tracts. It will be observed that the statute says that the term "transportation" shall *include cars* and all *instrumentalities* and *facilities of shipment* or *carriage* irrespective of ownership. Petitioner's car was in use by respondents as shippers at the time this accident occurred, to the extent that the horses were still occupying it, and so long as respondents continued to use the car, even to the extent of mere occupation, the "tranportation" continued, and, of course, so long as the "transportation" continued, the contract in its entirety must be considered as still applicable.

This cattle chute, which was a permanent structure erected for the purpose of unloading live stock, was an instrumentality and facility of shipment as contemplated by the statute (fols. 20, 21, 22). It does not

appear who owned the cattle chute, but that is a matter of no consequence, because the statute prescribes "irrespective of ownership." Therefore, if at the time of the accident it be assumed for the purpose of argument that the horses had actually left the car and were passing down the cattle chute into the pen, still within the contemplation of the statute the "transportation" would still be in progress.

Furthermore, the specific provision of the statute that "the term transportation shall include * * * all services in connection with the * * * delivery * * * of property transported" is in direct conflict with the construction adopted by the trial court. The occupation of the car by the horses at the time of this accident constituted a use of the petitioner's property by respondents, and such use was part of the service rendered by the petitioner in connection with the delivery of these horses. And the intended and necessary use of the cattle chute by the horses was a service still to be rendered in connection with the delivery of the property transported.

Thus, it is perfectly apparent that the transportation continued to and existed at the very moment when this accident occurred, and the same effect must be given to the contract as if the injury to the horses occurred while they were actually enroute to the place of their destination.

This Court in the case of *Cleveland & St. Louis Ry. v. Dettlebach,* 239 U. S. 588, had occasion to consider whether the terms of a bill of lading under which goods had been shipped were still applicable after the actual movement of the goods had ceased and while they were still in the railway company's possession as warehouseman. In the opinion in that case it was said in part as follows:

> "It is no longer open to question that if the loss had occurred in the course of transporta-

tion upon defendant's line, the limitation of liability agreed upon with the initial carrier, as this was, for the purpose of securing the lower of two rates of freight, would have been binding upon plaintiff, in view of the *Carmack Amendment, Adams Express Co. v. Croninger,* 226 U. S. 491, 509; *Kansas Southern Ry. v. Carl,* 227 U. S. 639, 648, 654; *Mo., Kans. & Tex. Ry. v. Harriman,* 227 U. S. 657, 668. The question is, whether the limitation of liability may be deemed to have spent its force upon the completion of the carrier's service as such, or must be held to control also, during the ensuing relation of warehouseman. * * *

"We recognize the cogency of the reasoning from the standpoint of the common law responsibility of a railway company as carrier and as a warehouseman. But we have to deal with the effect of an express contract made for the purpose of interstate transportation, and this must be determined in the light of the Act of Congress regulating the matter. The question is Federal in its nature. *Mo., Kans. & Tex. Ry. v. Harriman, 227* U. S. 657, 672; *Atchison, etc., Ry. v. Robinson,* 233 U. S. 173, 180. * * *

"And this (provision of the bill of lading) is quite in line with the letter and policy of the Commerce Act, and especially of the amendment of June 29, 1906, known as the Hepburn Act (34 Stat. 584, ch. 3591), which enlarged the definition of the term 'transportation' (this under the original act, included merely 'all instruments of shipment or carriage') so as to include 'cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and hauling of property transported'; etc. * * *

"From this and other provisions of the Hepburn Act it is evident that Congress recognized that the duty of carriers to the public

included the performance of a variety of services that, according to the theory of the common law, were separable from the carriers' service as carriers, etc. * * *

"We conclude that, under the provisions of the Hepburn Act and the terms of the bill of lading, the valuation placed upon the property here in question must be held to apply to defendant's responsibility as warehouseman."

This Court in the case of *Southern Ry. v. Prescott*, 240 U. S. 632, had occasion again to consider a situation where the facts were similar. In that case action was brought to recover damages for the loss of nine boxes of shoes destroyed by fire while in the freight house of the railway company. The entire shipment consisted of thirteen boxes of shoes, but the consignee had procured from the agent of the railway company four of the boxes of shoes and had asked permission that the rest be permitted to remain to await the consignee's convenience in removal. The trial court in that case submitted to the jury the question of liability under the state law, while the carrier contended that the shipment had not lost its interstate character, and that in spite of the fact that it had been lodged in the freight house following actual transportation, the provisions of the bill of lading were still controlling. And the decision by this Court held that the obligation of the railway company was not governed by the state law and that the provisions of the bill of lading applied.

The acknowledgment by respondents in the contract signed by them that they had the opportunity under the official tariffs of shipping the stock at a higher rate of freight constitutes *prima facie* evidence of choice by respondents and raises presumption that the tariff schedules were duly filed in compliance with the acts of Congress. *Cincinnati & Tex. Pac. Ry. v. Rankin*, 241 U. S. 319, 327, 328.

The requirement of the contract, that verified notice in writing of respondents' claim to be given to petitioner within five days from the time the stock is removed from the car and that the giving of such notice as a condition precedent to the maintenance of an action, is a reasonable and valid provision.

Chespeake & Ohio Ry. Co. v. McLaughlin, 242 U. S. 142.
Clegg v. St Louis & S. R. R. Co., 203 Fed. 971, 973.
Lewis v. Great Western R. Co., 5 H. & N. 867.
Black v. Wabash, etc., R. Co., 111 Illinois, 351.
Dawson v. St. Louis R. Co., 76 Mo. 514.
Pavitt v. Lehigh, etc., R. Co., 153 Pa. St. 302.
Anderson v. Lake Shore, etc., R. Co., 26 Ind. App. 196.
Olson v. C. B. & Q. R. R., 250 Fed. 372.

Respondents are conclusively presumed to know the contents of the contract.

Cau v. Texas & Pac. Ry. Co., 194 U. S. 427, 431.
Kansas Southern Ry. v. Carl, 227 U. S. 639, 653.
J. H. Hamlen & Sons Co., v. Illinois Cent. R. Co., 212 Fed. 324, 328.
Moore v. Duncan, 237 Fed. 782.
Western Transit Co. v. Leslie & Co., 242 U. S. 448, 454.

POINT III.

It is respectfully submitted that the judgment brought up for review be reversed.

THOMAS WATTS,
Of counsel for Petitioner.

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No. 342

Office Supreme Court, U. S.
FILED
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Supreme Court of the United States

ERIE RAILROAD COMPANY,

Petitioner,

against

JOHN R. SHUART, LEO SHUART, and JOHN R. SHUART, JR,, doing business under the name of JOHN R. SHUART, & SONS, *Respondents.*

Brief for Respondents

FRANK COMESKY,

Attorney for Respondents,

REEVES T. STRICKLAND,

of Counsel

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SUPREME COURT OF THE UNITED STATES

ERIE RAILROAD COMPANY,
Petitioner,
against
JOHN R. SHUART, LEO SHUART AND JOHN R. SHUART, JR., DOING BUSINESS UNDER THE NAME OF JOHN R. SHUART AND SONS,
Respondents.

BRIEF FOR RESPONDENTS.

Statement

The Respondents shipped twenty-two horses from East St. Louis to Suffern, New York, over the petitioner's road and in one of petitioner's cars (fols. 17 & 18). The horses arrived at Suffern about 2:30 A. M., April 9, 1912 (fol. 23). The respondents were on hand to receive the horses (fol. 20). The train conductor and one of the respondents stood in the cattle chute while the car was placed before it (fol. 20), and the brakes set upon the car and the engine disconnected, (fol. 21). The conductor then advised respondents to get the horses out as quickly as possible; he saw them open the car door and put down the bridge and do the work preliminary to taking the horses from the car, (fol. 21). The engine that had placed the car, moved out of the switch to the west and passing the horse car on an adjoining track (fol. 38) entered this switch again on it's easterly end, and while doing some switching there backed a train of freight cars down against the horse car with such force as to move the car

some three feet (fol. 39), and caused the injuries to the horses therein, of which respondents complain.

At the moment of the accident, the respondents, John R. Shuart and the son Leo, stood upon the bridge connecting the cattle-chute with the car, each having hold of two horses which they were about to lead from the car (fols. 22 and 38). The freight on this shipment had been paid by the respondent before the arrival of the car at Suffern (fol. 36).

Respondents by their complaint alleged (fol. 5) that the horses had been delivered to them and that the petitioner's control, supervision and interests in the carload of horses had ceased.

The livestock contract offered in evidence by the petitioner provided that the respondents were required to unload the horses (fol. 56), and petitioner's answer, contains an allegation to the same effect (fol 9).

The case was tried by respondents upon the theory that the transportation contract between respondents and petitioner had terminated; that the freight had been paid by respondents to petitioner; that petitioner had delivered the horses to the respondents in whose possession they were at the time of the injury. The petitioner denied that its negligence caused the accident and alleged that if there was any liability on the part of the petitioner the same was measured by the live stock contract.

It was admitted upon the trial by respondents that no claim had been made by them under the

live stock contract.

POINT I

Of the Live Stock Contract.

a—The Court's construction of the live stock contract is correct; it has no application to this case.

That the live stock contract is controlling while goods shipped in interstate commerce are in transit or are held by the carrier as a warehouseman is not denied. That is the holding of the two cases cited by petitioner. *Cleveland and St. Louis Ry. vs. Settleback,* 239 *U. S.* 588 *and Southern Ry. vs. Prescott,* 240 *U. S.* 632.

In the first of the above cases the Court held that where goods had been shipped in interstate commerce and held by the carrier at the point of destination as a warehouseman, the shipping contract measured the carrier's liability for damages to the goods while so held. Among other things the Court said:

> "From this and other provisions of the Hepburn act it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that, so far as interstate carriers by rail were concerned, the entire body of such services should be included together under the single term "*transportation,*" and subjected to the provisions of the act respecting reasonable rates and the like."

In the second case above referred to, the Court held that a bill of lading measured the liability of a carrier in interstate commerce where the goods remained in the possession of the carrier as a warehouseman at the point of their destination. The Court said:

> "The bill of lading in accordance with the published regulations provided that "every service" to be performed under it, including the service of the connecting or terminal carrier, should be subject to the conditions specified, and among these was the express *condition governing the company's responsibility as warehouseman for property not removed within forty-eight hours after notice of arrival.* Such a retention of the goods was undoubtedly a terminal service forming a part of the "transportation" in the sense of the Federal Act and governed by that act."

Again the Court said:

> "The actual service in holding the goods continued, and we must look to the bill of lading to determine the legal obligation attaching to that service."

The learned Justice who delivered the opinion, had previously been careful to say, *"It is apparent that there had been no actual delivery of the nine boxs."*

It will therefore be seen that neither of the cases cited by Appellant is authority for the claim that the live stock contract measures petitioner's liability. In both cases the goods were in the carrier's possession as warehouseman, while in the case at bar the horses were in the possession of the consignees, these respondents. In the cases cited the carrier still had some service to perform; in the cases at bar it had none.

While a carrier may be liable as a warehouse-

man after a constructive delivery of goods (Tarbel vs. Exchange Shipping Co. 110 N. Y. 170), no one would claim that a carrier was liable either as carrier or warehouseman after an actual delivery of goods. When actual delivery is made, the relation of carrier or warehouseman as the case may be, must cease. When goods pass out of a carrier's pessession and from under its control and into the possession of the consignee the obligations of the carrier are at an end.

Goodwin v. B. & O. R. R. Co., 50 N. Y., 154;
Tarbell v. Royal Exchange Shipping Co., 110 N. Y., 170.

b—The defense to this suit is based upon the failure of the respondents to comply with the terms of the live stock contract by presenting a verified claim for damages as therein specified, but this so-called contract is a nullity and not binding upon anyone.

The contract (fol. 54) purports to be made between the initial carrier and Holland Nugent Maxwell Bros., but it purports to be signed by the carrier and these respondents. Nowhere in the body of the contract does it appear that these respondents are parties to it. Throughout the body of the contract, Holland Nugent Maxwell Bros. are called the shippers. In the last paragraph of the contract it is stated that Holland Nugent Maxwell Bros. were given an opportunity to ship the stock at a higher freight etc., but no where in the paper does it appear that these respondents were given any such opportunity. This paper comes a long way from being such a contract as will bind the respondents and shield the defendant from its own negligence. The complaint alleges (fol. 5) and the answer admits (fol. 7) that respondents were the shippers. The live stock contract being a

nullity, it neither measured the damages nor prescribed the method of respondent's recovery. They were therefore not required to make the claim mentioned therein, but were entitled to proceed by this action.

Even if it be assumed that by signing this paper the respondent's thereby became a party to the contract, although not named therein, still neither by the terms of this contract or by the proof in this case does it appear that respondents were ever given the opportunity to ship the stock at the higher freight rate. It does however appear from the terms of the contract that a third person, in no way connected with these respondents, was given such opportunity (fol. 58).

It is only where the shipper is given the choice of the higher and lower freight rate and he makes a selection that he is bound by a shipping contract, even where the contract is otherwise in due form.

Boston and Maine Railroad Co., v. Piper, 246 U. S. 439.

POINT II

Of the Delivery of the Horse.

Respondents alleged delivery in their complaint as follows (fol. 5):

> "Said carload of horses was by defendant delivered to plaintiffs, and all control supervision and interest in said carload of horses by defendant thereupon ceased and terminated and plaintiffs accepted such delivery and thereupon took possession of the same."

Respondents established delivery by proof, as follows:

(a) Respondents were at the point of destination to receive the horses when they arrived (fol. 20).

(b) The train conductor and one of the respondents stood in the cattle-chute while the car was being placed in front of it and the respondents gave the conductor directions as to how it should be placed (fols. 21 and 22).

(c) When the car was in the right position one of the respondents said to the conductor, "That is good." Thereupon the brakes were set on the car, the engine was diconnected and it was moved away (fol. 21).

(d) The conductor then said to the respondents, "You had better get them (the horses) out as soon as you can, they have been on the road a good while and must be tired and hungry." (fol. 21). Thereupon the employees of the Railroad Company went away and left the horses in possession of the respondents. (fols. 37 and 38).

(e) Respondents opened the car door in the presence of the conductor (fol. 21) and proceeded with the work preliminary to taking the horses out of the car.

(f) At the time of the accident the bridge was in place connecting the car with the chute and two of the respondents stood upon it each holding two horses by their halters, in the very act of leading them from the car (fol. 22).

(g) The freight had been paid to the agent before the car arrived (fol. 36).

(h) It was the respondents' duty to unload the horses (fols. 9 and 56).

From the foreging it will be seen that respondents alleged and proved actual delivery of the horses to them before the accident; therefore the livestock contract was at an end. It no longer defined the relations of the parties or measured their rights and obligations toward each other.

The Court in submitting the case to the jury said (fol. 53).

> "The actual transportation had ended; and the only thing that remained to be done, under the contract, was the work that the plaintiffs had to do. The defendant's work was over."

The question of the extent to which a drover's pass shields a railroad company from liability for negligence was before the Court of Appeals of the State of New York in Stinson v. N. Y. C. & H. R. R. Co., 32 N. Y. 333. There it was held that the drover's pass did not apply although the pass was in the pocket of the plaintiff's intestate at the time of his death, for the reason that the journey under which it was to become operative had not commenced. Here the livestock contract does not apply, because the journey under which it had operated was at an end and the property covered by it had been delivered to respondents.

POINT III.

The judgment appealed from should be affirmed.

Respectfully submitted,

March, 1919. FRANK COMESKY,
Attorney for Respondent.

REEVES T. STRICKLAND
of Counsel.

ERIE RAILROAD COMPANY *v.* SHUART ET AL., DOING BUSINESS UNDER THE NAME OF JOHN R. SHUART & SONS.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 342. Submitted April 25, 1919.—Decided June 9, 1919.

In a contract governing an interstate shipment of live stock the carrier's liability for negligent injury of the stock during transportation may lawfully be conditioned upon the presentation of a written claim by the shipper within five days from their removal from the cars. P. 467.

In view of the enlarged scope of "transportation," as defined by the Hepburn Act, an interstate movement of live stock is not ended when the car containing them is placed opposite a cattle chute of the carrier on a switch track at destination and left in charge of the shipper for unloading, when an adequate time for unloading them has not expired, although the shipper assumed the duty, risk and expense of their unloading by the terms of the contract for transportation. *Id. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588.

Reversed.

THE case is stated in the opinion.

Mr. Thomas Watts for petitioner.

Mr. Reeves T. Strickland for respondents. *Mr. Frank Comesky* was on the brief.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Respondents delivered to the Toledo, St. Louis & Western Railroad at East St. Louis, Illinois, a carload of horses for transportation, under a Limited Liability Livestock Contract or bill of lading via petitioner's road, to themselves at Suffern, New York, their home. Among other things the contract provided:

"That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same." . . . "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any Court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the General Auditor of the said carrier at his office in the City of Chicago, Ill., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier, on whose line the loss or injury occurs."

Immediately after the car arrived at Suffern, petitioner placed it on a switch track opposite a cattle chute and left it in charge of respondents for unloading. By letting

down a bridge they at once connected the chute and car and were about to lead out four horses when an engine pushed other cars against it and injured the animals therein. No written claim was made for the loss or damage as provided by the bill of lading; and when sued the carrier defended upon that ground. Respondents maintain that transportation had ended when the accident occurred and consequently no written claim was necessary. The courts below accepted this view.

Under our former opinions, the clause requiring presentation of a written claim is clearly valid and controlling as to any liability arising from beginning to end of the transportation contracted for. *Chesapeake & Ohio Ry. Co.* v. *McLaughlin*, 242 U. S. 142; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Starbird*, 243 U. S. 592; *Baltimore & Ohio R. R. Co.* v. *Leach*, 249 U. S. 217; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593, 594; and *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach* we pointed out that the Hepburn Act enlarged the definition of "transportation" so as to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and hauling of property transported"; and we said from this and other provisions of the act "it is evident that Congress recognized that the duty of carriers to the public included the performance of a variety of services that, according to the theory of the common law, were separable from the carrier's service as carrier, and, in order to prevent overcharges and discriminations from being made under the pretext of performing such additional services, it enacted that so far as inter-

state carriers by rail were concerned the entire body of such services should be included together under the single term 'transportation' and subjected to the provisions of the Act respecting reasonable rates and the like."

In the instant case, when injured, the animals were awaiting removal from the car through a cattle chute alleged to be owned, operated and controlled by the railroad. If its employees had then been doing the work of unloading there could be no doubt that transportation was still in progress; and we think that giving active charge of the removal to respondents, as agreed, was not enough to end the interstate movement. The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See Hutchinson on Carriers, §§ 711, 714, 715.

Petitioner's request for an instructed verdict in its behalf should have been granted. The judgment below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE CLARKE dissenting.

I greatly regret that I cannot concur in the opinion and judgment of the court in this case, but I cannot consent to share in what seems to me a very strained construction of a definition in the Hepburn Act (34 Stat. 584, c. 3591, § 1) which will result in keeping alive a bill of lading, with the effect of excusing the carrier from liability for negligently damaging the live stock of a consignee, after it had been delivered, on the ground that a claim in writing for the damage, duly verified, had not been presented within five days.

My reasons for dissenting, stated as briefly as may be, are as follows:

It is shown by the opinion of the court that the consignee, a partnership of three members, was bound by the bill of lading to unload the horses at destination.

The consignee, being notified by the carrier as to the probable time of the arrival of the car, on the day before it arrived, paid what was supposed to be the full amount of the freight charges, and two members of the partnership were at the station at three o'clock in the morning to receive and unload it.

When the train came, the senior member of the consignee stood in the cattle chute with the conductor, while the latter was placing the car for unloading and approved as satisfactory the position in which it was placed. Thereupon, a brakeman set the brake, the engine was cut off and the conductor went away and left the car in the sole custody of the consignee, after saying to its representative, "You had better get them out as soon as you can, they have been on the road a good while and must be tired and hungry." Two members of the partnership, consignee, went to work at once to unload the horses, but it was necessary to get some boards to make the bridge from the car to the chute safe, and in about half an hour, when the two were in the act of leading two horses from the car, other cars were negligently thrown against it and caused the damage sued for.

I dissent from the opinion of the court because I agree with the three New York courts that the undisputed facts thus stated show that the transportation was ended and the delivery of the stock was so completely made as to end all liability of the carrier under the bill of lading, before the negligence of the company occurred which caused the damage complained of.

What constitutes delivery of goods or of live stock by a carrier is usually a mixed question of law and fact, but

where, as here, the facts are not disputed, it is a question of law.

What more was there for the carrier to do,—what more could it have done—to make more complete the delivery necessary to fulfill its obligation as a carrier? The journey was ended, the freight charges were paid, and the car was placed on a side track in an appropriate place and position for unloading, which was approved by the consignee. It had been accepted by two members of the partnership, consignee, and had passed into their exclusive custody a full half hour before the accident. No assistance was asked for or needed after the conductor delivered the car and went away and thereafter the carrier owed to the consignee only the duty which it owed to any property lawfully upon or near to its tracks,—not to negligently or wilfully injure it, and it was for violation of that duty, not for failure to discharge duties imposed by the bill of lading, that this suit was instituted. The case is one of side track delivery, the equivalent of the familiar delivery of a car to an "industrial track" or "team unloading track" of a railroad, with possession taken by the consignee before the damage was done.

To the weighty authority of the New York courts which decided in this case that the delivery was complete before the damage was done, may be added, a few from many, the decisions of the Supreme Courts: of Michigan, in a strikingly similar case but with not so complete a delivery, in *Brown* v. *Pontiac, Oxford & Northern R. R. Co.*, 133 Michigan, 371; of Illinois, in *Gratiot Street Warehouse Co.* v. *St. Louis, Alton & Terre Haute R. R. Co.*, 221 Illinois, 418; of North Carolina, in *Reid* v. *Southern Ry. Co.*, 149 N. Car. 423; of Georgia, in *Kenny Co.* v. *Atlanta & West Point R. R. Co.*, 122 Georgia, 365. And see *Hedges* v. *Hudson River R. R. Co.*, 49 N. Y. 223.

The definition of "transportation" in the Hepburn Act (34 Stat. 584), relied upon in the court's opinion, seems

to me quite irrelevant. That provision was incorporated into the act to prevent unjust discrimination by carriers in terminal delivery charges, as the context and the history of the act abundantly show. It defined "transportation" but did not define what should constitute delivery to a consignee,—that was left untouched and is governed by the prior decisions of courts and by those which have been developed since.

Equally beside the question involved seems to me the decision in *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Dettlebach*, 239 U. S. 588, 593, 594, cited in the opinion of the court. The question there under consideration was, whether when goods carried to destination were lost, after they had been held more than a month uncalled for, the liability of the carrier was to be determined by the terms of the bill of lading or by the more limited liability of a warehouseman. Obviously there was no question in the case as to what constituted delivery, for there was no pretense of delivery, actual or constructive, and therefore the decision cannot be of service in determining this case.

The opinion of the court in this case concludes:

"The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. These included the furnishing of fair opportunity and proper facilities for safe unloading although the shippers had contracted to do the work of actual removal. See Hutchinson on Carriers, §§ 711, 714, 715."

I cannot find justification, in the sections cited, for such a statement of the law as is here made.

Section 711 deals with the obligation to unload carload freight, and, after saying that it is "the uniform rule and custom in this country" for the consignee to unload, the only other relevant statement of the writer is:

"All, therefore, that can be required of the railroad

company is that it shall place the cars where they may be safely and conveniently unloaded."

This the carrier in the case before us had done to the satisfaction and acceptance of the consignee before the accident complained of.

Section 714 deals with the liability of the carrier pending removal (delivery) of the goods, and says:

"During this reasonable time [for delivery] the liability of the carrier remains unchanged; but so soon as it has elapsed he no longer stands in the relation of carrier to the goods, but in that of an ordinary bailee for hire."

The "reasonable time" here referred to is palpably that necessary for the carrier to wait before its obligation becomes that of a warehouseman when the consignee does not appear to claim the shipment,—it is not applicable to the time for unloading after the property has been accepted by the consignee.

Section 715 declares that:

"If the consignee is bound to unload the goods himself from the car, it is the duty of the carrier to place the car where it can be unloaded with a reasonable degree of convenience, and to furnish the consignee with safe and proper facilities for the purpose."

All of this the carrier in this case did, and the consignee not only approved as satisfactory, safe and proper, the position in which the car was placed and the facilities furnished for unloading it, but the delivery of the car was accepted and was in the actual possession and custody of the consignee for a very considerable time before the accident complained of happened. It was not in any attempt or effort on the part of the carrier to improve the unloading facilities or to assist the consignee that the damage was done, but it was the result of a tort, pure and simple,—of a negligent switching operation, entirely independent of the delivery of the shipment, occurring a half hour after it had been accepted.

The delivery having been completed and accepted by the consignee, the five-day limitation, so unreasonable in itself that it has been prohibited by congressional enactment (38 Stat. 1196, c. 176, § 1) has, in my judgment, no applicability to this case, and to bottom the conclusion announced upon the definition of "transportation" in the Hepburn Act is to convert what was intended for the protection of shippers of property in interstate commerce into an instrument of injury and injustice.

For the reasons thus stated I dissent from the opinion and judgment of the court.

MR. JUSTICE MCKENNA and MR. JUSTICE BRANDEIS concur in this dissent. MR. JUSTICE DAY also dissents.